ARTICLE

MANDAMUS REVIEW OF THE GRANTING OF THE MOTION FOR NEW TRIAL: LOST IN THE THICKET[1]

RICHARD E. FLINT[2]

I. Introduction. 576
II. The Historical Roots of Revising a Trial Court's Granting of New Trials in Texas by Appeal or Writ of Error 583
III. Historical Roots of the Use of Mandamus to Revise the Granting of New Trials in Texas. 593
A. The Abuse of Discretion Dictum 593
B. Mandamus to Compel a District Court to Proceed to Judgment and to Enforce Its Own Jurisdiction. 596
C. Mandamus to Compel a District Court to Enter Judgment in the Case of Alleged Irreconcilable Jury Answers. 601

1. Chief Justice Calvert referred to the use of mandamus proceedings to control or correct trial court's incidental rulings as entering into the "thicket." *See* Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding) (noting that entering into the thicket to correct one incidental ruling would lead to requests to control and correct other incidental rulings), *cert. denied*, 397 U.S. 997 (1970). Several years later, Justice Barrow asserted that the Texas Supreme Court had become "totally enshrouded" in that thicket. *See* Jampole v. Touchy, 673 S.W.2d 569, 578 (Tex. 1984) (orig. proceeding) (Barrow, J., dissenting) (arguing that the use of mandamus in the discovery context has resulted in "constant interruptions of the trial process"). As will be shown in this article, the Texas Supreme Court is now lost in the thicket—by its own choice—without the desire to extricate itself. Thus, the time has come for the legislature to return mandamus relief to its historical roots as an extraordinary remedy that should not be used to control the discretionary incidental rulings of trial judges.

2. Albert Hermann Professor of Law, St. Mary's University School of Law. B.A., Ph.D., J.D., University of Texas at Austin; M.A. (Theology), St. Mary's University.

D. Mandamus to Compel the District Court to Vacate an Order Setting Aside a Verdict and Granting a New Trial When Such Order Is Void 609
E. Mandamus to Correct an Abuse of Discretion 612
IV. *In re Columbia Medical Center of Las Colinas, Subsidiary, LP* and Its Progeny 626
V. Conclusion 650

I. INTRODUCTION

A trial court's broad discretion in granting a new trial has been one of the mainstays of Texas jurisprudence since early statehood. Historically, this discretion was not subject to review through the ordinary appellate processes.[3] This principle remains inviolate today, as the granting of a

3. *See* Puckett v. Reed, 37 Tex. 308, 310 (1872) (stating that it was "a well-settled principle that the discretion of the [d]istrict [c]ourt in granting new trials during [its] term" would not be revised); Goss v. McClaren, 17 Tex. 107, 115 (1856) (noting that the discretion given the trial judge was the basis for the supreme court's refusal to revise the granting of a new trial by appeal); Parrott v. Underwood, 10 Tex. 48, 48–49 (1853) (stating that the trial court's granting of a new trial was not generally subject to revision). On the other hand, in situations where a trial court had refused to grant a new trial and entered judgment on the verdict, the appellate courts have historically had the authority to revise the trial court's decision. In an early opinion, the supreme court explained this ability in the following words:

> Applications for new trials are addressed to the discretion of the court, governed by certain legal rules. Subject to those rules, the judge to whom the application is addressed must decide as his own sense of justice shall dictate upon the circumstances of such case. It is impossible to prescribe rules which shall afford a certain guide for the determination of every case; and where the law does not furnish a rule the application must of necessity be addressed to the discretion of the presiding judge. Having presided at the trial, having seen the witnesses and heard them testify, his means of judging of the correctness of the verdict and the propriety of granting a new trial are superior to those afforded the appellate court by a mere statement of the evidence in the record. Hence, in revising the judgment of the [d]istrict [c]ourt refusing a new trial, it has been the uniform practice of this court not to reverse the judgment unless it clearly appears that the party applying has brought his application within those rules which entitled him to a new trial as a matter of law. The inquiry has been, not whether, upon the evidence in the record, it apparently might have been proper to grant the application in the particular case, but whether the refusal of it has involved the violation of a clear legal right or a manifest abuse of judicial discretion.

Ables v. Donley, 8 Tex. 331, 336–37 (1852). Today, the Texas Rules of Appellate Procedure specifically authorize the supreme court to remand cases back to the lower court. *See* TEX. R. APP. P. 60.2(d) (authorizing a reversal and remand for further proceedings); *Id.* R. 60.2(f) (authorizing vacating the judgment and remanding "for further proceedings in light of changes in the law"); *Id.* R. 60.3 (authorizing a reversal and remand in the interest of justice). Furthermore, the intermediate appellate courts have the authority to revise trial court judgments and to remand cases back to the trial court. *See Id.* R. 43.2(d) (permitting a reversal and remand for further proceedings).

new trial is an interlocutory order from which the appellate courts of Texas do not have jurisdiction.[4] Furthermore, the use of an original mandamus proceeding to compel a trial court to set aside the granting of a new trial has had only limited application. In fact, in *Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial District*,[5] a unanimous Texas Supreme Court held: "The discretion and judgment of the trial court in granting a new trial cannot be controlled or directed by mandamus."[6] The court continued by stating:

> There are only two instances where *any appellate court of this state* has ever directed the trial judge to set aside its order granting motion for new trial. These instances are:
> (1) When the trial court's order was wholly void as where it was not entered in the term in which the trial was had; and
> (2) Where the trial court has granted a new trial specifying in the written order the sole ground that the jury's answers to special issues were conflicting.[7]

4. The Texas Supreme Court has consistently held that absent legislative authority, it has no jurisdiction over an appeal from a trial court's timely granting of a new trial, as the order is interlocutory. *See, e.g.*, Little v. Morris, 10 Tex. 263, 266 (1853) (stating that it was settled doctrine "that an appeal, and, since the repeal of the 141st section of the act of 1846, a writ of error will not lie to revise an interlocutory judgment"); Stewart v. Jones, 9 Tex. 469, 470 (1853) (holding that the supreme court did not have jurisdiction over an appeal from the granting of a new trial); Gross v. McClaran, 8 Tex. 341, 342 (1852) (holding that the supreme court did not have jurisdiction over interlocutory orders unless the legislature had provided for it by statute); *see also In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 218 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting) (noting that the legislature had authorized interlocutory review of new trial orders in criminal proceedings, but had not authorized such review in civil proceedings); Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam) (citations omitted) ("An order granting a new trial is an unappealable, interlocutory order."); Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984) (per curiam) (citations omitted) (stating that "[a]n order granting a new trial" was not subject to review either from appeal of the order itself or "from a final judgment rendered" in subsequent proceedings).

5. Johnson v. Ct. of Civ. App. for the Seventh Sup. Jud. Dist. of Tex., 162 Tex. 613, 350 S.W.2d 330, 331 (1961) (orig. proceeding), *abrogated by In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746 (Tex. 2013) (orig. proceeding).

6. *Id.*

7. *Id.* (emphasis added). The *Johnson* court did not cite any support for these two limitations on the trial court's discretion in granting new trials because these two limitations had been well-engrained in Texas jurisprudence for some time. At the time of the *Johnson* case, the courts of civil appeals had limited mandamus jurisdiction, and were not authorized to issue writs of mandamus to correct an abuse of discretion; they were only authorized to issue mandamus to enforce their jurisdiction or to compel a district or county court to proceed to trial and judgment in a case. *See* Act approved April 13, 1892, 22d Leg., 1st C.S., ch. 15, §§ 6, 9, 1892 Tex. Gen. Laws 25, 26, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 389, 390–91 (Austin, Gammel Book Co. 1898) (amended 1985) (current version at TEX. GOV'T CODE ANN. §§ 22.221(a), (b) (West 2004)). The statute authorizing the mandamus jurisdiction of the court of civil appeals followed the 1891

Subsequently, in another mandamus case, a unanimous supreme court reaffirmed the "broad discretion" of the trial court in granting new trials.[8] The court quoted the earlier *Johnson* case and reaffirmed that there were only two recognized situations where a Texas appellate court had directed a trial court to set aside its order granting a new trial.[9] In addition, in the

amendments to the Texas Constitution that had authorized the legislature to establish the Courts of Civil Appeals. Act approved April 28, 1891, S.J.R. 16, § 6, 1891 Tex. Gen. Laws 197, 198, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 199, 200–01 (Austin, Gammel Book Co. 1898) (adopted by election August 11, 1891). That same constitutional amendment granted the Courts of Civil Appeals appellate jurisdiction over certain civil cases and authorized the legislature to enact legislation to grant such courts other original and appellate jurisdiction. *Id.* The court of civil appeals in the *Johnson* case issued a mandamus to compel the trial judge to rescind its order granting a new trial holding that the trial court had abused its discretion in granting the new trial. Hibbets v. Johnson, 342 S.W.2d 642, 644 (Tex. Civ. App.—Amarillo 1961, orig. proceeding) (per curiam), *mand. granted*, *Johnson (Seventh Sup. Jud.)*, 350 S.W.2d at 330. The supreme court held that the court of civil appeals did not have jurisdiction to compel a trial court to set aside the granting of a new trial and ordering the trial court to enter judgment on the verdict solely on the basis of an abuse of discretion. *See Ct. of Civ. App.*, 350 S.W.2d at 331–32 (holding that the court of civil appeals did not have jurisdiction to issue writs of mandamus to correct a clear abuse of discretion). Furthermore, the supreme court noted that Texas Rule of Civil Procedure 300 only compelled the trial court to enter a judgment on the verdict when it had not granted a post-verdict motion, such as a motion for new trial. *Id.* at 332 (observing that the rule compelled a trial judge to enter judgment on the verdict unless it was set aside). Thus, mandamus would not issue even under the rules of civil procedure, as the trial court could not be compelled to render a judgment on the verdict, because it had already set aside that verdict and granted a new trial. *Id.*

8. *See* Johnson v. Fourth Ct. of App., 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding) (recognizing the principle that, historically, trial courts exercised broad discretion in whether or not a new trial was granted), *disapproved of in Columbia*, 290 S.W.3d at 204. By the time this case arose, the court of appeals and the supreme court had concurrent mandamus jurisdiction over district judges. *Id.* at 917 (noting the existence of concurrent jurisdiction as of June 19, 1983); *see also* Act of June 19, 1983, 68th Leg., R.S., ch. 839, § 3, 1983 Tex. Gen. Laws 4767, 4768–69 (amended 1985) (current version at TEX. GOV'T CODE ANN. § 22.221(b) (West 2004)) (authorizing the court of appeals to issue writs of mandamus "agreeable to the principles of law regulating those writs" against district judges). Notwithstanding the existence of concurrent jurisdiction, the rules that have regulated appellate practice have provided that the petition for mandamus normally should initially be filed in the intermediate appellate court. *See* TEX. R. CIV. P. 474, 6 TEX. B.J. 403 (1943, amended 1985) (stating that in the case of concurrent jurisdiction, the writ should be presented to the court of civil appeals first); *see also* TEX. R. APP. P. 121(a)(1), 49 TEX. B.J. 585–86 (Tex. Sup. Ct. 1986, amended 1997) (stating that when there is concurrent jurisdiction, the writ should first be presented to the court of appeals). *See generally* TEX. R. APP. P. 52.3(e) (stating that in the case of concurrent jurisdiction that the petition must first be presented to the court of appeals "unless there is a compelling reason not to do so").

9. The two instances were:

> (1) When the trial court's order was wholly void as where it was not rendered in the term in which the trial was had; and (2) Where the trial court has granted a new trial specifying in the written order the sole ground that the jury's answers to special issues were conflicting.

Johnson, 700 S.W.2d at 918.

second *Johnson* case, the court specifically held that granting a new trial "in the interest of justice and fairness" was not an abuse of discretion.[10]

Over the next twenty years, the supreme court not only reaffirmed that it was not an abuse of discretion for a trial court to grant a new trial "in the interest of justice," but also reiterated that there were only two specific situations where the supreme court had compelled a trial court to set aside its order granting a motion for new trial.[11] For example, in 1988, the supreme court unanimously reaffirmed the second *Johnson* holding that it was not an abuse of discretion for a trial court to grant a new trial in the interest of justice.[12] Furthermore, in 2005, another unanimous Texas Supreme Court reaffirmed that there were only two instances where an order granting a new trial rendered within the period of the trial court's plenary power would be reviewed by Texas appellate courts: where the trial court's order was void, or in a situation where the trial court

10. *Id.* In the second *Johnson* case, the motion for new trial included a prayer that a new trial be granted "in the interest of justice and fairness." The order granting the new trial had merely stated that the "motion is good and that a new trial should be granted." *Id.* However, the record contained the judge's statement that she had granted the new trial in "total fairness of the entire case." *Id.* Based upon the entire record, the supreme court held that the "trial court had granted the new trial 'in the interest of justice and fairness.'" *Id.* Traditionally in Texas, mandamus would issue to compel judges or government officials to perform a purely ministerial act that did not involve the exercise of discretion. *See* Lloyd v. Brinck, 35 Tex. 1, 9 (1871) (orig. proceeding) (stating that a writ of mandamus will issue to compel the performance of a duty that is "simply ministerial and involves no judicial discretion"). However, by the time of the second *Johnson* case, mandamus would generally issue to correct a clear abuse of discretion or a violation of a duty imposed by law when the remedy by appeal was inadequate. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (stating that a clear abuse of discretion and no adequate remedy by appeal were the two requirements to entitle a party to mandamus relief); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (stating that mandamus would issue only to correct abuses of discretion or violations of legal duties when there was no adequate legal remedy); State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding) (stating that mandamus would issue to correct an abuse of discretion or the violation of a legal duty when there was an inadequate remedy by law (citing *Johnson*, 700 S.W.2d at 917)); Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 683 (1956) (orig. proceeding) (establishing the precedent that mandamus would issue to correct an abuse of discretion). For a detailed history of mandamus jurisprudence in Texas, see Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 3–148 (2007). The second *Johnson* court noted that the court of appeals exceeded its writ power when it granted mandamus relief in the absence of a clear abuse of discretion by the trial court with no adequate remedy by law. *See Johnson*, 700 S.W.2d at 917.

11. Champion Int'l Corp. v. Twelfth Ct. of App., 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding) (per curiam), *disapproved of in Columbia*, 290 S.W.3d at 204.

12. *Id.* In *Champion*, the trial court had granted a mistrial in the interest of justice. *Id.* The court of appeals, in an unpublished opinion, had conditionally granted a mandamus to compel the trial court to enter judgment on the verdict, holding that it was an abuse of discretion to grant a mistrial without "stating adequate legal grounds." *Id.* The supreme court conditionally granted mandamus relief ordering the court of appeals to set aside its order holding that granting a mistrial in the interest of justice was not an abuse of discretion. *Id.*

erroneously concluded that "the jury's answers to special issues were irreconcilably" in conflict.[13] With this well-settled law, one would have hardly expected the Texas Supreme Court to overrule clear and time-tested precedents, imposing new limitations on the discretionary authority of the trial court in granting new trials, and at the same time, to jettison well-recognized principles of mandamus jurisprudence;[14] but in 2009, the court took exactly such actions.[15]

In the case of *In re Columbia Medical Center of Las Colinas, Subsidiary, LP*,[16] the trial court granted the plaintiffs' motion for new trial "in the interests of justice and fairness" following a lengthy trial where the jury returned a unanimous verdict for the defendants.[17] A sharply divided Texas

13. Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005) (citing *Johnson*, 700 S.W.2d at 918; Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984) (per curiam)).

14. Several years ago, the author lamented the fact that, in the area of mandamus jurisprudence, the Texas Supreme Court had replaced the doctrine of stare decisis with ad hoc decision making whenever it felt the interlocutory decision of the trial court was just not right. Richard E Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 138–43 (2007). The author asserted that sound judicial reasoning and adherence to precedent should trump purported good intentions, and that the Court should refrain from interjecting itself into ministerial trial court matters. *Id.* at 148. Chief Justice Calvert emphasized this very point over fifty years ago in the following words:

> There is sound reason why appellate courts should not have jurisdiction to issue writs of mandamus to control or to correct incidental rulings of a trial judge when there is an adequate remedy by appeal. Trials must be orderly; and constant interruption of the trial process would destroy all semblance of orderly trial proceedings. Moreover, with this type of intervention by appellate courts, the fundamental concept of all American judicial systems of trial and appeal would become outmoded. Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus that trial judges enter orders, or set aside orders, sustaining or overruling (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, . . . (7) motions for new trial . . . .

Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding), *cert. denied*, 397 U.S. 997 (1970). However, both Justice Pope's concerns and this author's earlier admonitions apparently fell on deaf ears, as the Texas Supreme Court has once again interjected itself through its mandamus jurisdiction into the incidental rulings of trial judges. *In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746 (Tex. 2013) (orig. proceeding); *In re* United Scaffolding, Inc., 377 S.W.3d 685, 688–89 (Tex. 2012) (orig. proceeding) (establishing a two–part standard for evaluating the reasons given by a trial court in granting a motion for new trial); *Columbia*, 290 S.W.3d at 213 (holding that a trial court acted arbitrarily and abused its discretion when it set aside a jury verdict without giving the reasons for doing so).

15. *Columbia*, 290 S.W.3d at 213.

16. *In re* Columbia Med. Ctr. of Las Colinas Subsidiary, LP, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding).

17. *Id.* at 206. The motion for new trial included three grounds specifically: that the jury's answer to the defendant's negligence was "against the great weight and preponderance of the evidence[;]" that the evidence presented conclusively established the defendant's negligence; and it was in the interest of justice and fairness. *Id.*

Supreme Court held that the failure of the trial court to disclose the reasons for disregarding the jury's verdict and entering a new trial was arbitrary and an abuse of discretion.[18] Thus, the court conditionally granted a mandamus to direct the trial court to state reasons for the granting of the new trial that were "clearly identified and reasonably specific."[19] In doing so, the court specifically disapproved of the holding in the second *Johnson* case and held that broad statements in orders granting new trials such as "in the interest of justice" were not sufficiently specific.[20] The Texas Supreme Court's decision was a dramatic rejection of the then-existing discretionary authority of the trial judge to grant new trials; furthermore, such decision was a radical shift in Texas mandamus jurisprudence.[21] In retrospect, however, the *Columbia* decision was just another example of the continuing trend of jurisdictional expansion by the Texas Supreme Court over trial courts' interlocutory orders.[22]

This article proposes to examine and evaluate whether the *Columbia* case is in the best interest of Texas jurisprudence. Part II of this article will undertake to review the historical development of the district court's

18. *Id.* at 213.

19. *Id.* at 215.

20. *Id.* (disapproving the holding in the *Champion* case also).

21. The dissent chastised the majority opinion stating that the court jettisoned the existing law. *Id.* at 215 (O'Neill, J., dissenting). Justice O'Neill objected to the expansion of the abuse of discretion prong in granting mandamus relief in a situation that was clearly not an arbitrary action or a violation of a legal duty. *Id.* at 215 (O'Neill, J., dissenting).

22. *See id.* at 215–16 (O'Neill, J., dissenting) (noting that given the majority opinion she saw "no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory ruling"). In an earlier case, the supreme court had warned against the excessive use of mandamus review in the following words: "Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse." *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding). The majority opinion in *Columbia* supported its rejection of over one hundred years of legal authority by a simplistic, if not disingenuous policy argument, stating:

> [A] vague explanation [in the interest of justice] in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury.

Columbia, 290 S.W.3d at 213. Ironically, the court itself failed to address how the jettisoning of over 100 years of legal precedents enhanced the respect for the judiciary or the rule of law. The majority also rejected the dissent's assertion that its decision was motivated by fear that some judges might abuse "the privilege of their discretion." *Id.* at 214. Yet in the very same paragraph the court recognized the possibility that under its holding trial judges might give "specious reasons for setting aside a jury verdict." *Id.* This statement portended that the court was merely waiting for the right case to come along where it could further intrude into the incidental rulings of a trial court by not only devising a test to evaluate the given reasons for the granting of a new trial, but also developing a standard of review for examining the validity of the stated reasons.

discretion in the granting of new trials and the appellate review of such decisions by the Texas Supreme Court.[23] This part will primarily focus on the legal and philosophical justifications for the limitations imposed on the court's appellate authority to revise a trial court's granting of a new trial. Part III of this article will trace the historical development of the Texas Supreme Court's mandamus jurisprudence as it relates to compelling trial courts to vacate the granting of new trials from statehood until the controversial *Columbia* decision. In that regard, this part will primarily focus on the historical, legal, and philosophical bases that gave rise to the two instances where mandamus relief was available to revise a trial court's granting of a new trial. This part of the article will conclude with a brief historical review of the development of the abuse of discretion standard for the granting of mandamus relief. Part IV of this article will examine and analyze the *Columbia* case in light of the then-Texas jurisprudence dealing with the discretionary actions of trial judges in granting new trials and mandamus review of such actions. The practical ramifications of the *Columbia* case upon the authority of the appellate courts to undertake increased supervision of the granting of new trials by district courts will also be discussed.[24] These ramifications are already coming into fruition. In 2012, the court articulated a two-part test for evaluating the reasons given by the trial court in granting a new trial.[25] Then in 2013, the court held that it had the authority on mandamus review to conduct a merit-based review to determine if the reasons given for granting a motion for new trial were supported by the record.[26] These two particular

23. The sole focus of this article is the Texas Supreme Court's authority to review the interlocutory granting of new trials by district courts in Texas. While there is no doubt that the Texas Supreme Court has the ability to review an appeal from a case granting a bill of review which has the effect of "granting a new trial" and entering a new judgment, such review is undertaken under the normal appellate procedures following the entry of a final judgment, not an interlocutory one.

24. The dissent in *Columbia* suggested that such ramifications of the court's ruling would be better addressed through the vetting of ideas that was provided by the court's rule-making process. *See Columbia*, 290 S.W.3d at 219 (O'Neill, J., dissenting) (noting the "parameters for reviewing the trial court's explanation" for granting a new trial). The majority in the *Columbia* case rejected this rule-making approach for the simple stated reason that, in its opinion, the then-current status of the law was the result of the decisions of the court and not the rules of civil procedure. *Id.* at 214. While the majority's reason is partially true, as will be established in this article, when the court drastically changes the course of the law through one decision coming out of the blue, one would think that prudence alone, or at least in conjunction with respect for the rule of law, would have dictated a more reasoned, transparent, and consultative approach.

25. *See In re* United Scaffolding, Inc., 377 S.W.3d 685, 689 (Tex. 2012) (orig. proceeding) ("This two-part test adequately ensures that jury verdicts are not overturned without specific and proper reasons, while still maintaining trial courts' discretion in granting new trials.").

26. *In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746, 749 (Tex. 2013) (orig. proceeding).

ramifications are a necessary corollary to the *Columbia* decision.[27] For once, the supreme court decided that it had mandamus authority to compel a trial court to state its specific reasons for granting a new trial; the court could not let the reasons go unchallenged without some sort of standard to evaluate those reasons and the ability to review the legal and factual bases for those reasons, or the *Columbia* case would become totally irrelevant and insignificant.[28] Part V of this article will encourage the court to reject the *Columbia* case and its progeny as an improper intrusion on the discretion of the trial court and as an unnecessary expansion of the appellate courts' mandamus authority. However, given the proclivity of the court to expand its mandamus jurisprudence in an ever-increasing manner, it is doubtful that the Texas Supreme Court would even consider a reversal of the *Columbia* decision on its own. Thus, the article will conclude with a recommendation for the enactment by the Texas Legislature of legislation to stop the growing mandamus intrusion of Texas appellate courts into the discretionary decision-making of trial courts.

II. THE HISTORICAL ROOTS OF REVISING A TRIAL COURT'S GRANTING OF NEW TRIALS IN TEXAS BY APPEAL OR WRIT OF ERROR

The first Constitution of the State of Texas vested the judicial power of the state in a supreme court and district courts and such other courts as the legislature might provide.[29] The first legislative session after statehood implemented statutes that defined the powers and jurisdiction of district

27. *Toyota*, 407 S.W.3d at 749; *United Scaffolding*, 377 S.W.3d at 688–89.

28. Justice Wainwright recently echoed this point in the following language: "[W]ithout a true merits-based review of the reasons given for granting new trials, *Columbia* will not be fully effective. A rule that cannot be enforced is, in realty, no rule at all." *United Scaffolding*, 377 S.W.3d at 693 (Wainwright, J., concurring).

29. TEX. CONST. of 1845, art IV, § 1. The various constitutions of the state have all provided that the judicial power of the state shall be vested in various courts. *See* TEX. CONST. art. V, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."); TEX. CONST. of 1869, art. V, § 1 ("The [j]udicial power of this State shall be vested in one Supreme Court, in District Courts, and such in inferior courts and magistrates as may be created by this Constitution, or by the Legislature under its authority."); TEX. CONST. of 1866, art. IV, § 1 ("The [j]udicial power of this State shall be vested in one Supreme Court, in District Courts, in County Courts, and in such [c]orporation courts and other inferior [c]ourts or tribunals as the [l]egislature may from time to time ordain and establish."); TEX CONST. of 1861, art. IV, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in District Courts, and in such inferior courts as the Legislature may from time to time ordain and establish.").

courts,[30] as well as regulating the proceedings in those courts.[31] The statute that established the procedures to be followed in district courts contained the following provision concerning new trials:

> New trials may be granted in all civil cases, on such terms and conditions as the court may direct, but not more than two new trials shall be granted to either party in the same cause except the jury have been guilty of some misconduct or erred in matter of law.[32]

This particular statute also provided that a timely filed motion for new trial "shall be determined at the term of the court at which said motion shall be made."[33] The underlying justification for the limitations on the trial court's authority in granting new trials was to impose a sense of finality in cases.[34] Thus, the early Texas decisions made it clear that once

30. Act approved May 11, 1846, 1st Leg., R.S., §§ 1–27, 1846 Tex. Gen. Laws 200, 200–06, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1506, 1506–12 (Austin, Gammel Book Co. 1898).

31. Act approved May 13, 1846, 1st Leg., R.S., §§ 1–158, 1846 Tex. Gen. Laws 363, 363–408, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1669–1714 (Austin, Gammel Book Co. 1898).

32. *Id.* § 109, at 392, at 1698. It should be noted that the laws of the Republic of Texas had originally provided almost identical language concerning a district court's ability to grant new trials. *See* Act approved Dec. 21, 1836, 1st Cong., R.S. § 18, 1836 Repub. Tex. Laws 198, 204**,** *reprinted in* 1 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1258, 1264 (Austin, Gammel Book Co. 1898) (stating that a new trial could be granted under the court's terms and conditions). This statute of the Republic was subsequently amended to provide that a new trial could be granted for *good cause shown*. Act approved Dec. 18, 1837, 2d Cong., R.S. § 3, 1837 Repub. Tex. Laws 94, 95**,** *reprinted in* 1 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1436, 1437 (Austin, Gammel Book Co. 1898). There were no cases during the Republic era dealing with either why the change was made, or concerning what constituted good cause or good cause shown. Furthermore, until the initial codification of all the civil statutes in Texas in 1879, the law in Texas was that a district court could grant new trials on such terms and conditions as it would direct. It was only as a result of the revision and adoption by the legislature of the initial Revised Civil Statutes of the State of Texas that the requirement of good cause became a lynchpin for the granting of a new trial. That particular statue was recodified several times before being repealed by the Rules of Practice Act. *See* Act approved Feb. 21, 1879, 16th Leg., R.S., Title XXIX, ch. 17, art. 1368, *reprinted in* TEXAS, *The Revised Civil Statutes of the State of Texas*, at 213, 213 (Galveston, A.H. Belo & Co., 1879), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of March 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version at TEX. R. CIV. P. 320) (stating that new trials may be granted for good cause). The Rules of Practice Act authorized the Supreme Court of Texas to promulgate rules of practice for the civil courts in the state repealing all laws governing the practice and procedures in civil courts. The amendment authorized interim rulemaking authority so the Texas Supreme Court could establish rules prior to the effective date of the Rules of Practice Act.

33. Act approved May 13, 1846, 1st Leg., R.S., § 112, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898).

34. Since statehood, a trial court lost jurisdiction over a case, including a pending motion for new trial, following the expiration of the term of the court. The supreme court, in discussing the expiration of the district court's jurisdiction over a motion for new trial following the expiration of the term of the court, said as follows:

the court's term was over, the judgment was binding and conclusive, subject only to being set aside by the trial court on sufficient cause.[35]

> It is insisted that the statute is but directory and that it was within the power of the court to postpone to the next term and then act upon the motion for a new trial. We cannot so regard it. We think the mandate of the law is peremptory and must be obeyed, and that at the end of the term the motion not having been acted on was discharged by operation of law. . . . But the judge not having the legal authority to continue the motion [until the next term], the order for that purpose and that made dependent upon it were alike void.

McKean v. Ziller, 9 Tex. 58, 59 (1852). The rigid terms of court created unnecessary delays and wastes of time for all involved in the process, as typically under the term system, trials and judicial proceedings in progress came to an end with the termination of the term and had to begin again at the next term. *General Commentary 1966*, TEX. R. CIV. P. 329b (West 1977). This rather inflexible system, although modified from time to time, continued until mid–1950. *See* Act of May 21, 1955, 54th Leg., R.S., ch. 297, § 1, 1955 Tex. Gen. Laws 806, 806, *repealed by* Act of June 12, 1985, 69th Leg., R.S., ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1745 (current version at TEX. GOV'T CODE ANN. § 24.012 (West Supp. 2013)) (stating in part that unless otherwise provided by law, district court terms are continuous). In addition, the enactment of Rule 329b of the Texas Rules of Civil Procedure, effective January 1, 1955, was also designed in part to bring uniformity to new trial practice in district courts. *See General Commentary 1966*, TEX. R. CIV. P. 329b (West 1977) (citing uniformity as a goal of the legislation). Today, irrespective of the court's term, the trial court has jurisdiction over all matters in a pending cause, including a timely filed motion for new trial, until its plenary power expires. *See* TEX. R. CIV. P. 329b (providing that a trial court's plenary power expires thirty days after all timely filed motions for new trial are overruled); *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 230 (Tex. 2008) (orig. proceeding) (observing that since January 1, 1981, Rule 329b has provided that the trial court's plenary power terminated thirty days after all timely motions for new trial are overruled). Thus, today, not dissimilar to the time of early statehood, a trial court's granting of a new trial after its jurisdiction has expired is void. *See In re* Goss, 160 S.W.3d 288, 292 (Tex. App.—Texarkana 2005, orig. proceeding) (holding that the trial court lacked jurisdiction to grant a new trial more than thirty days after a timely filed motion for new trial was overruled); *see also In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (per curiam) (stating that an order for new trial granted after the court's plenary power expired was void). However, the early Texas cases held that when a judge entered a void order dismissing a case, or a case was dismissed through the inadvertence of the court or the parties, the case could be reinstated following the expiration of the term. *See* Johnson v. Cheney, 17 Tex. 336, 340 (1856) (reinstating a case in the next term that had been dismissed for arbitration, but the arbitrators refused to act as the agreement to refer to arbitration was invalid); Garrett v. Gaines, 6 Tex. 435, 447–48 (1851) (holding that because the order dismissing the case for lack of prosecution was void, the case could be reinstated in the next term).

35. Historically, once the term of the court was over, resort to an equitable bill of review was the only remedy available in the trial court for setting aside the judgment. *See Ziller*, 9 Tex. at 59 (noting that after the term of the court was over, the trial court could vacate or alter the judgment only in an original equitable proceeding having sufficient grounds); Caperton v. Wanslow, 18 Tex. 125, 133–34 (1856) (stating that after the term of court, as the rights of the parties in the judgment were vested, the trial judge had no power to set it aside, except by way of bill of review); Goss v. McClaren, 17 Tex. 107, 115 (1856) (reviewing that after the term expired, the rights under a judgment became vested and could only be revised for sufficient legal cause in a direct proceeding). *See generally* TEX. R. CIV. P. 329b(f) (providing that upon the expiration of its plenary power a trial court cannot set aside a judgment "except by bill of review").

The only significant case involving appellate review in the Texas Supreme Court[36] of a district court's granting of a new trial during term

36. The first Texas Constitution limited the Texas Supreme Court to appellate jurisdiction. TEX. CONST. of 1845, art IV, § 3 (providing in part that "[t]he [s]upreme [c]ourt shall have appellate jurisdiction only, which shall be co-extensive with the limits of the State"). Under this constitution, all appeals from the district court went directly to the supreme court, as there were no intermediate appellate courts. The first legislature provided two separate methods for invoking the jurisdiction of the supreme court appeal and writ of error. *See* Act approved May 13, 1846, 1st Leg. R.S. § 134, 1846 Tex. Gen. Laws 363, 398, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1704 (Austin, Gammel Book Co. 1898) (amended 1985) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (West Supp. 2013)) (allowing for the appeal of a county or district court judgment in an amount of $250 to the court of appeals); Act approved May 13, 1846, 1st Leg. R.S. § 140, 1846 Tex. Gen. Laws 363, 400–01, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1706–07 (Austin, Gammel Book Co. 1898) (amended 1985) (current version at CIV. PRAC. & REM. § 51.012) (authorizing for a writ of error from the trial court to the court of appeals). Under the original statute the perfection of an appeal required that a bond be filed within twenty days after the term in which the judgment was rendered. Act approved May 13, 1846, 1st Leg. R.S. § 136, 1846 Tex. Gen. Laws 363, 399, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1705 (Austin, Gammel Book Co. 1898). Until 1858 a party could perfect a writ of error without filing a bond. *See id.* § 140, at 400–01, at 1706–07, *amended by* Act approved Feb. 5, 1858, 7th Leg., R.S., § 13, 1858 Tex. Gen. Laws 110, 112, *reprinted in* 4 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 982, 984 (Austin, Gammel Book Co. 1898) (requiring a bond to remove a case from the district court to the supreme court by a writ of error); *see also* Davis v. Carter, 18 Tex. 400, 401 (1857) (noting that one could appeal by way of a writ of error without filing a bond); Turner v. Hamilton, 6 Tex. 250, 251 (1851) (stating that, while a bond was not necessary for the perfection of a writ of error, a bond was necessary to supersede the judgment). The writ of error has always been considered as a separate and distinct method of having appellate review of a trial court's legal and factual determinations. *See* Norman Commc'ns v. Tex. Eastman Co., 955 S.W.2d 269, 270 (1997) (per curiam) (stating that "the writ of error afford[ed] an appellant the same scope of review as an ordinary appeal"); Ward v. Scarborough, 236 S.W. 441, 444 (Tex. Comm'n App. 1922, judgm't adopted) (stating that both the appeal and writ of error provided the opportunity for revision of all rulings of the trial court); Brooks v. Breeding, 32 Tex. 752, 756–57 (1870) (noting that in a writ of error proceeding the appellate court could review both errors of law and fact); Lacey v. Ashe, 21 Tex. 394, 395 (1858) (stating that a writ of error varied from an appeal only in such "incidents and conditions" as might be prescribed by law); Cheek v. Rogers, 1 Tex. 440, 441 (1846) (noting that the supreme court's authority to review and correct a trial court's judgment was the same in either an appeal or writ of error). Until 1939 either option was available for any aggrieved party to seek review of a district court's decision; in that year, the legislature limited the availability of the writ of error to those who had not participated in the "actual trial of the case in the trial court." Act of May 31, 1939, 46th Leg., R.S., ch. 2, § 1, 1939 Tex. Gen. Laws 59, 59, *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version at TEX. R. APP. P. 30) (providing that a restricted appeal is available for a "party who did not participate in the hearing that resulted in the judgment complained of"); *see also* Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 591 (Tex. 1996) (holding that a writ of error was available to a party who had not participated in the decision making event complained of on appeal). Originally, a writ of error had to be granted within two years "from the rendition of the judgment." Act approved May 13, 1846, 1st Leg. R.S. § 142, 1846 Tex. Gen. Laws 363, 402, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1708 (Austin, Gammel Book Co. 1898). The present statute and rule permit the writ of error to be brought within six months after the rendition of the judgment. TEX. CIV. PRAC. & REM. CODE

was *Sweeney v. Jarvis*.[37] In *Sweeney*, following the return of a general verdict for the plaintiff, the defendant moved for a new trial on grounds of newly

ANN. § 51.013 (West 2008); TEX. R. APP. P. 30. The notes and comments following the rule state in part: "The appeal by writ of error procedure is repealed. A procedure for an appeal filed within 6 months—called a restricted—appeal is substituted." TEX. R. APP. P. 30. The constitution of 1876 provided a court of appeals and provided for its jurisdiction. *See* TEX. CONST. of 1876, art. V, § 1 (vesting a portion of the judicial power of the state in a Court of Appeals); *Id.* art. V, § 6 (conferring appellate jurisdiction on the Court of Appeals in all criminal cases and in all civil cases in which the county courts have original or appellate jurisdiction unless otherwise provided by law). However, this court never had jurisdiction over appeals or writ of errors from the district courts in civil matters. In 1891 the Texas Constitution was amended to authorize the legislature to establish courts of civil appeals with appellate jurisdiction over appeals from district and county courts. *See* Act approved Apr. 28, 1891, S.J.R. No. 16, § 6, 22d Leg., R.S., 1891 Tex. Gen. Laws 197, 198–99, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 199, 200–01 (Austin, Gammel Book Co. 1898) (adopted by election August 11, 1891). The amendments to the constitution at this time also authorized the supreme court to hear appeals from the court of civil appeals. *Id.* § 3, at 197, at 199. In response to the constitutional provisions, the legislature amended the statutes that had authorized appeals and writ of errors to be taken from judgments of the district court directly to the supreme court and enacted the following statute:

> An appeal or writ of error may be taken to the court of civil appeals from every final judgment of the district court in civil cases and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases of which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars, exclusive of the interest and costs . . . .

Act approved on Apr. 13, 1892, 22d Leg., 1st C.S., ch. 17, § 1, 1892 Tex. Gen. Laws 42, 43, *reprinted in* 10 H.P.N GAMMEL, *The Laws of Texas 1822–1897*, at 406, 407 (Austin, Gammel Book Co. 1898) (amended 1985) (current version at CIV. PRAC. & REM. § 51.012 (West Supp. 2013)) (providing for both appeal and writ of error from district and county courts to the court of appeals).

37. Sweeney v. Jarvis, 6 Tex. 36 (1851). The court noted that there had been "no case in which [this court] has revised a judgment granting a new trial." *Id.* at 39. In fact, prior to the *Sweeney* case there had only been a few cases where the court discussed the trial court's granting of a new trial. In the first of those cases, the supreme court held that on appeal from a judgment rendered following the granting of a new trial, the court would not consider any errors that were committed during the first trial. Kirkman v. Snively, 2 Tex. 447, 448 (1847). Another case involved an interpretation of the statutory provision that provided that "not more than two new trials shall be granted to either party in the same cause except the jury have been guilty of some misconduct or erred in matter of law." Act approved May 13, 1846, 1st Leg., R.S., § 109, 1846 Tex. Gen Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898). In *Luckett v. Townsend*, the district court granted two new trials, and the case was before the Texas Supreme Court on writ of error from the judgment in the third trial of the case. Luckett v. Townsend, 3 Tex. 119, 123 (1848). The supreme court was of the opinion that the verdict was "manifestly against the law." *Id.* at 133. Therefore, under its interpretation of the statute, it was authorized—in effect—to grant a third new trial by remanding the case for a third trial. *Id.* at 135. Finally, in *Merle v. Andrews*, the trial court granted a new trial after the term of the court at which the motion for new trial had been made, in spite of the statutory requirement that all motions for new trial must be determined during the term in which they were filed. Merle v. Andrews, 4 Tex. 200, 215–16 (1849). The supreme court held that after the court's term, the trial court could only set aside its earlier judgment through a bill of review proceeding. *Id.* at 213–16.

discovered evidence.[38] Even though the application was legally insufficient, as it did not contain any statement that the defendant had used due diligence in discovering the new evidence,[39] the trial court granted the motion.[40] Following the retrial of the case, a judgment was

38. *Sweeney*, 6 Tex. at 37. At this time, the Texas statutes required that "all motions for new trials . . . shall be accompanied by a written specification of the grounds on which it is founded" and also provided that new trials could be granted when damages "are manifestly too small as when they are excessive." Act approved May 13, 1846, 1st Leg., R.S., §§ 111–12, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898). *But see Sweeney*, 6 Tex. at 44 (noting that, while a party did not have the right to be heard on grounds not included in the motion, nothing prohibited the judge from considering other grounds).

39. The court succinctly stated the requirements that had to be established in order to have a motion for new trial granted on grounds of newly discovered evidence. The court stated:

> It is well settled that a new trial will not be granted on the ground of newly discovered evidence, if the facts proposed to be proved by the new evidence be not disclosed and set out in the application. Nor will a new trial, in general, be granted on the ground of new and material evidence, if supported only by the affidavit of the party. To entitle a party to a new trial for this cause, it is incumbent on him to satisfy the court that the evidence has come to his knowledge since the trial; that it was not owing to the want of due diligence that it was not discovered sooner; and that it would probably produce a different result upon a new trial, if granted. He must also set forth the facts in which the new evidence consists, so that the court may judge of their materiality[:] whether the new evidence be only cumulative[;] and whether, if admitted, it would probably change the result of the former trial. And for the same reason, when the question is brought up for revision here, the record ought to be accompanied by a statement of facts; otherwise we may have no means of determining upon the propriety of the application.

Madden v. Shapard, 3 Tex. 49, 50 (1848) (citations omitted).

40. *Sweeney*, 6 Tex. at 37. At this time, the order granting a new trial being an interlocutory order was not subject to appeal. *See* Gross v. McClaran, 8 Tex. 341, 342 (1852) (noting that under the constitution there could be no appeal from an order granting a new trial absent legislative authorization). The first legislature had authorized writs of error from interlocutory orders. *See* Act approved May 13, 1846, 1st Leg., R.S. § 141, 1846 Tex. Gen. Laws 363, 401–02, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1707–08 (Austin, Gammel Book Co. 1898) ("[J]udges of the supreme or district court only, shall grant writs of error on interlocutory judgments, and always on the same terms and conditions prescribed in the preceding section for writs of error on final judgments."); *see also* Robinson v. Baillieul, 2 Tex. 160, 161 (1847) (dismissing an appeal from an interlocutory order as the legislature had only authorized writs of error from such orders). The law was quickly repealed and soon totally forgotten. Act approved Mar. 16, 1848, 2d Leg., R.S., ch. 95, § 22, 1848 Tex. Gen. Laws 106, 111–12, 392, *reprinted in* 3 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 106, 111–12 (Austin, Gammel Book Co. 1898); Houston v. Starr, 12 Tex. 424, 425 (1854) (noting that it was well settled that neither an appeal nor writ of error would lie from an order granting a new trial or any other interlocutory orders); Little v. Morris 10 Tex. 263, 266 (1853) (observing that it was "the settled doctrine of this court, affirmed by repeated decisions, that an appeal, and . . . a writ of error will not lie to revise an interlocutory judgment or any order made during the progress of the cause until after final judgment rendered in the case"). Today, as a general rule, only final judgments—those that dispose of all issues and parties—are subject to appeal in Texas. *See* Lehmann v. Har–Con Corp., 39 S.W.3d 191, 195 (Tex. 2001) (noting that as a general rule, an appeal could only be taken from a final judgment); N.E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966) (observing that subject to a few exceptions, an appeal could be

rendered on the verdict for the defendant and an appeal was undertaken to the supreme court.[41] The primary ground for the appeal was the assertion that the trial court had erred in granting the new trial following the first trial of the case.[42] Thus, the supreme court was requested to set aside the

prosecuted only from a final judgment that disposes of all parties and issues in the case). Although there still is a general prohibition against interlocutory appeals in Texas, the legislature has adopted a general provision that authorizes interlocutory appeals in eleven specific situations. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1)–(11) (West Supp. 2013). There are other statutes that authorize interlocutory appeals in specific cases. *See* TEX. BUS. ORG. CODE ANN. § 2.106(b) (West 2012) (allowing interlocutory appeals from a trial court's denial of a motion for summary judgment based upon immunity for certain non–profit corporations); *see also* CIV. PRAC. & REM. § 15.003 (West Supp. 2013) (authorizing interlocutory appeals in certain venue and joinder determinations involving multiple plaintiffs and intervening plaintiffs in venue matters).

However, today no statute authorizes an appeal from the granting of a new trial. There was a short period in the history of Texas where there was statutory authority for an interlocutory appeal from the granting of a new trial. The particular statute provided as follows:

> An appeal may be taken to the [c]ourt of [c]ivil [a]ppeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases in which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds on[e] hundred dollars exclusive of interest and costs, and provided that an appeal may be taken to the [c]ourt of [c]ivil [a]ppeals from every order of any district or county court in civil cases granting motions for new trials in any of the above mentioned cases and such appeal shall be taken within the same time and in the same manner as if the judgment was final.

Act of Feb. 23, 1925, 39th Leg., R.S., ch 18, § A, 1925 Tex. Gen. Laws 45, 45 (current version at CIV. PRAC. & REM. § 51.012).

The next legislative session repealed this statute and reenacted the previous law that did not authorize appeals from the granting of a new trial. Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 1, 1927 Tex. Gen. Laws 75, 75 (amended 1985) (current version at CIV. PRAC. & REM. § 51.012). The emergency clause of the repealing statute stated in part:

> The fact that in the codification of 1925, the provision providing for [w]rits of [e]rror was inadvertently omitted and the further fact numerous appeals have been taken to the Court of Civil Appeals from orders of district and county courts in civil cases, granting motions for new trials for the sole purpose of securing delay to litigants and that in almost every case the order of the lower court has been affirmed for the reason that the granting of new trials is largely discretionary with the trial court . . . .

Id. § 2, at 75–76. One court of civil appeals stated, "That statute [permitting appeals from the granting of new trials] was an anomaly in Texas practice and has been productive of nothing but trouble and confusion in our system." Com. Credit Co. v. Chandler, 297 S.W. 333, 333 (Tex. Civ. App.—San Antonio 1927, no writ). Another court of civil appeals held the statute was unconstitutional. *See* Globe Indem. Co. v. Barnes, 280 S.W. 275, 276 (Tex. Civ. App.—Amarillo, 1926, no writ) (holding the statute unconstitutional for "failure to indicate in the caption of repealing the right to a writ of error").

41. *Sweeney*, 6 Tex. at 37.

42. There was an additional ground of error raised by the plaintiff in error. This alleged error involved the insufficiency of the bond that had been filed by the defendant in error in the first lawsuit, and the trial court's decision to allow the defendant in error to give a new bond. *Id.* at 37–38.

proceedings subsequent to the first trial and enter judgment on the original verdict.[43] The supreme court began its opinion by observing that, at common law, a trial court had the unfettered right to grant or refuse a motion for new trial.[44] The court then acknowledged that although it was settled practice in Texas to revise decisions of district courts in *refusing to grant a new trial*,[45] the Texas Supreme Court had never revised an order

The *Sweeney* case involved a suit for rights to property that had been levied on by execution. *Id.* at 36. As the defendant in error had not been a party to the execution, the law required him to post a bond as security. Act approved Jan. 27, 1842, 6th Cong., R.S., § 7, 1842 Repub. Tex. Laws 66, 67, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 738, 739 (Austin, Gammel Book Co. 1898), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version TEX. R. CIV. P. 644) (providing that property seized by a writ of execution can be returned upon delivery of a bond).

43. *Sweeney*, 6 Tex. at 38–39. The court noted that the plaintiff in error was relying on the law of various states where, in all probability, statutes authorized appellate courts to revise trial court's granting of new trials. *Id.* at 39.

44. *Id.* The Constitution of the Republic authorized the congress to enact the common law of England with "such modifications as our circumstances, in their judgment, may require." REPUB. TEX. CONST. of 1836, art IV, § 13, *reprinted in* 1 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1074, 1074 (Austin, Gammel Book Co. 1898). As a result of such authorization, the fourth Congress of the Republic enacted the common law of England "so far as not inconsistent with the Constitution or the Acts of Congress now," and providing that it "together with such acts be the rules of decision in this Republic, and shall continue in full force until altered or repealed by Congress." Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3, 3–4, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 177, 177–178 (Austin, Gammel Book Co. 1898); CIV. PRAC. & REM. § 5.001 (West 2002) (stating that the "rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state"); Great S. Life Ins. Co. v. City of Austin, 112 Tex. 1, 243 S.W. 778, 780 (1922) (noting that the rule of decision in Texas was the common law as declared by the various states). However, the Republic Congress adopted the petition and answer form of pleading and rejected the common law system of pleading. *See* Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 88, 88, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 262, 262 (Austin, Gammel Book Co. 1898) (stating that adopting the common law was not to be construed as an adoption of the common law system of pleading); Seguin v. Maverick, 24 Tex. 526, 532 (1859) (noting that Texas had not adopted the pleadings or practices of the English chancery or common law courts). The constitution of the State of Texas provided that the laws of the Republic continued as effective after statehood. *See* TEX. CONST. of 1845, Art. XIII, § 3 ("All laws and parts of laws now in force in the [R]epublic of Texas, which are not repugnant to the constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force, as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof.").

45. *Sweeney*, 6 Tex. at 39 (noting that unless the court was authorized to revise the trial court's refusal to grant a new trial, irreparable injury would occur). However, the supreme court had noted earlier that it was never enough to set aside the verdict on appeal that the verdict was not right, "but it must clearly appear that it is wrong." Briscoe v. Bronaugh, 1 Tex. 326, 340 (1846).

granting a new trial.[46] In summarizing the legal reasoning for the distinction, the court stated:

> And although in the exercise of that discretion [the discretion to grant a new trial] injustice may sometimes be done, there is still this material and obvious distinction between the improper refusal and granting of a new trial. In the one case the injury is irreparable unless by a revising tribunal; in the other it ordinarily is not so, for another opportunity of obtaining justice is afforded [a second trial].[47]

After acknowledging that a trial court's discretion in some procedural matters was not subject to revision,[48] the court stated that it was not necessary to determine whether it had the authority to revise a district court's granting of a new trial.[49] It based this pronouncement upon the court's determination that even if it had the power to reverse the trial court's granting of a new trial, it would not do so in this case.[50] The court noted that if it had the power to reverse a trial court's granting of a new trial, it would exercise such power only if there had been error in granting the new trial in the first place.[51] In this case, the only alleged error raised was that the application for new trial was legally insufficient.[52] In response to this ground of error, the court stated that while the "essential requisites of the law must be complied with," the court would not necessarily reverse the granting of a new trial because the motion did not strictly comply with the law.[53] It would also be necessary to find that the

46. *Sweeney*, 6 Tex. at 39. The court stated that injury might be irreparable if a new trial was improperly granted, "but it is not necessarily so, nor is such the natural or probable consequence." *Id.* The court continued by saying:

> Ordinarily and in the absence of those casualties which may deprive a party of evidence upon the second trial which he had upon the first, the presumption is that the justice of the case will be as certainly attained upon the second as upon the first trial. For upon the second trial, as Blackstone in treating of this subject justly observes, the parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject, and nothing is now tried but the real merits of the case.

Id. (citation omitted) (internal quotation marks omitted).

47. *Id.* at 40.

48. *Id.* at 40 (giving the example of the trial court granting a continuance).

49. *Id.*

50. *Id.*

51. *Id.* at 40–41 (opining that where the revising power existed, the presumption was that the new trial should "have been granted unless the contrary appear[s] by [the] record").

52. *Id.* at 41. The court noted that if the trial court had denied the application for new trial for failure to comply with the requirements of the law, the court would not have reversed the trial court's decision. *Id.*

53. *Id.* at 42.

trial court had abused its discretion in granting the new trial.[54] In this case, as no statement of the facts was before the court, the court presumed that there were other sufficient reasons for granting the new trial, notwithstanding the legally insufficient application.[55] Therefore, the judgment in the second trial was affirmed as the record failed to establish that there was insufficient "cause for granting the new trial or that it was improperly or erroneously granted."[56] As there was no error in granting the new trial, it was not necessary for the supreme court to address whether it had the authority to revise the granting of a new trial that had been erroneously granted.[57] Since the *Sweeney* decision, the Texas Supreme Court has never again directly addressed whether it has the authority to reverse a trial court's granting of a new trial, nor has it ever exercised any authority to revise the decision of a trial court's granting of a new trial by way of appeal or writ of error.[58]

54. Sweeney v. Jarvis, 6 Tex. 36, 43 (1851) ("[T]he correct principle, seems to be that to authorize the reversal of a judgment granting a new trial, it must be shown that the court abused its discretion to the prejudice of the party who seeks to reverse the judgment.").

55. *Id.* The court put it in these words:

> The court appears to have derived a knowledge of the character and existence of the new evidence from affidavits accompanying the motion, and in so far to have acted upon the evidence there furnished; but the diligence used by the party may have been otherwise made apparent to the court. Every presumption is to be indulged in favor of the judgment. The party may not have shown in the motion sufficient to entitle him to a new trial. But we must suppose, unless the contrary had been made to appear, that there were sufficient reasons apparent to the court, and that the judgment granting the new trial was legal and correct, especially as the party on whom it was incumbent to show error, if it existed, has not caused to be embodied in the record a statement of the facts.

Id.

56. *Id.* at 44.

57. *See id.* (refusing to discuss the ability of the court to revise the judgment of the trial court—as it found no error in the trial court's decision).

58. In *Puckett v. Reed*, the court clearly articulated its own understanding of the *Sweeney* case by asserting that "[i]t is a well-settled principle that the discretion of the [d]istrict [c]ourt in granting new trials during term, will not be revised by this court." Puckett v. Reed, 37 Tex. 308, 310 (1872) (citing *Sweeney*, 6 Tex. at 39). Although the *Sweeney* court noted there might be a need for appellate revising power to place effective limitations upon the discretion of trial judges, the court has never adopted such an approach. *See Sweeney*, 6 Tex. at 39–40 (acknowledging the possibility of abuse of discretion by trial judges, but believing it would be limited to "extreme cases"). However, in recent years the supreme court has alluded to the concept of appellate review of a trial court's granting of a new trial while evaluating the adequacy of an appeal in determining whether to issue a mandamus. In a case in which the court granted a new trial following the return of a jury verdict and a mandamus was sought to compel judgment on the verdict, the supreme court addressed the adequacy of an appellate remedy in these words:

> If Columbia suffered an unfavorable verdict, it could not obtain reversal unless it convinced an appellate court that the granting of the new trial was error, and that the error either prevented

III. THE HISTORICAL ROOTS OF THE USE OF MANDAMUS TO REVISE THE GRANTING OF NEW TRIALS IN TEXAS

A. *The Abuse of Discretion Dictum*

The first state constitution of Texas authorized the Texas Supreme Court to issue mandamus when it is "necessary to enforce its own jurisdiction" and to compel trial judges to "proceed to the trial and judgment."[59] The first legislature enacted a statute organizing the supreme court and creating its jurisdiction, which included the implementation of the constitutional grant of authority to issue writs of mandamus.[60] The first significant case discussing the principles that

> Columbia from properly presenting its case on appeal or probably caused entry of an improper judgment. And even if an unfavorable verdict were reversed and rendered in Columbia's favor, Columbia would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why, and would have endured the time, trouble, and expense of the second trial. Under the circumstances, Columbia does not have an adequate appellate remedy.

In re Columbia Med. Ctr. of Las Colinas Subsidiary, LP, 290 S.W.3d 204, 209–10 (Tex. 2009) (orig. proceeding) (citations omitted). In *In re Prudential Insurance Co. of America*, the relator sought mandamus relief to compel a trial court to enforce a contractual waiver of the right to trial by jury, after the trial court had denied the request and set the case for jury trial. In discussing the adequacy of the appellate remedy the court stated:

> It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. . . . Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (citations omitted) (internal quotation marks omitted).

59. TEX. CONST. of 1845, art. IV, § 3. The constitutions of 1861, 1866, 1869, and the current constitution, originally enacted in 1876, also granted the supreme court original jurisdiction to issue mandamus. *See* TEX. CONST. art. V, § 3(a) (providing that the court could issue writs of mandamus to enforce its jurisdiction under regulations prescribed by law); TEX. CONST. of 1869, art. V, § 3 (stating that the court could issue mandamus under such regulations as may be permitted by law to enforce its jurisdiction); TEX. CONST. of 1866, art. IV, § 3 (providing simply that the court could issue writs of mandamus to enforce its jurisdiction); TEX. CONST. of 1861, art. IV, § 3 (granting power to the court so that it could issue writs of mandamus not only to enforce its jurisdiction, but also to compel a district court judge to proceed to trial and judgment).

60. Act approved May 12, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 249, 249, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1555, 1561–62 (Austin, Gammel Book Co. 1898) (providing that the supreme court could issues such writs "as may be necessary to enforce the jurisdiction of said court, and also to compel a judge of the district court to proceed to trial and judgment in a cause agreeable to the principles and uses of law"). Although the statute authorizing the exercise of original mandamus jurisdiction has been amended and recodified from time to time to specify the persons or official against whom the court could issue mandamus, the two fundamental bases for the issuance have remained inviolate. *See, e.g.*, TEX. GOV'T CODE ANN. § 22.002(a) (West

governed the issuance of mandamus in Texas was *Arberry v. Beavers*.[61] *Arberry* involved a contested election where it was alleged that the chief justice of a county failed to perform his duty to count and record all the votes that were cast.[62] The district judge issued a mandamus to compel the chief justice to perform his duty in compliance with the laws regulating elections.[63] From the action of the district judge in issuing the writ, an appeal to the supreme court ensued.[64] The court outlined the common law principles of mandamus and defined its application in Texas:

> It lies to compel public officers and courts of inferior jurisdiction to proceed to do those acts which clearly appertain to their duty. But it does not lie to instruct them as to the manner in which they shall discharge a duty, which involves the exercise of discretion or judgment. The distinction seems to be, that, if the inferior tribunal has jurisdiction, and refuses to act, or to entertain the question for its decision, in cases where the law enjoins upon it to do the act required, or if the act be merely ministerial in its character, obedience to the law will be enforced by mandamus, where no other legal remedy exists. But, if the act to be performed involves the exercise of judgment, or if the subordinate public agent has a discretion in regard to the matter within his cognizance, and proceeds to exercise it according to the authority conferred by law, the superior court cannot lawfully interfere to control or govern that judgment or discretion by mandamus.[65]

The court evaluated the duties of the chief justice under the law and determined that the duty of the chief justice in this case was one of discretion; therefore, he was not in violation of a duty imposed by law.[66] Therefore, the court held that the district court's granting of mandamus relief was erroneous, as mandamus did not lie to correct a public official in his discretionary actions.[67]

Supp. 2013) (authorizing the supreme court to issue writs of mandamus agreeable to the principles of law regulating those writs); *Id.* § 22.002(b) (authorizing the supreme court to issue writs of mandamus to compel judges to proceed to trial and judgment in a case).

61. Arberry v. Beavers, 6 Tex. 457 (1851).

62. *Id.* at 458.

63. *Id.* at 459.

64. *Id.*

65. *Id.* at 464–65 (emphasis in original).

66. *Id.* at 469–74.

67. *Id.* at 474–75. The court also noted that in the case of a ministerial act a trial court had no judicial or discretionary powers and that a mandamus would issue to compel the judge to perform his duty. *Id.* at 472. The supreme court earlier distinguished between ministerial actions and those judicial or discretionary actions as follows:

> The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act

By way of dictum, the court noted that an abuse of discretion by a public official might be of such a nature as to justify the issuance of mandamus in the following language:

> I do not doubt that a public officer, or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined or to act at all, in contemplation of law, and in such a case[,] a *mandamus* would afford a remedy where there was no other adequate remedy provided by law.[68]

The following year, Justice Wheeler, the author of the *Arberry* decision, took the opportunity to reiterate his opinion that mandamus would lie to correct a public official who had abused his discretion. In *Meyer v. Carolan*,[69] he stated in his concurring opinion that a public official may warrant mandamus if he "be guilty of so gross an abuse of the discretion confided to him, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[70]

From these passing references, a wellspring poured forth over a century later establishing abuse of discretion as one of the two fundamental tenets of mandamus jurisprudence in Texas.[71] The acts that constituted a gross abuse of discretion as contemplated by Justice Wheeler were ones which moved the public official or tribunal out of the protected area of discretion into the area of ministerial obligation. It was left to later courts to not only identify which acts constituted a gross abuse of discretion, but also to craft a legal understanding of the phrase so that it did not just become a mantra to recite whenever an appellate court was dissatisfied with the decision of a trial court and wanted to substitute its opinion for that of the trial court.

> to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.

Comm'r of the Gen. Land Off. v. Smith, 5 Tex. 471, 479 (1849) (citations omitted).

68. *Arberry*, 6 Tex. at 472 (emphasis added).

69. Meyer v. Carolan, 9 Tex. 250 (1852).

70. *Id.* at 255 (Wheeler, J., concurring). The majority in the *Meyer* case held that mandamus would not lie as the action of the clerk of the court in determining the sufficiency of a bond was in the realm of his discretion. *Id.* at 254. Furthermore, the majority by way of dictum noted that even if the clerk had wantonly disregarded his duty, mandamus would not lie as there was an adequate remedy by way of a suit for malfeasance of office. *Id.*

71. *See* Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 682–83 (1956) (orig. proceeding) (noting that there had been no Texas cases where mandamus had issued to correct a discretionary action, but holding that one might issue to correct a clear abuse of discretion); *see also In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (stating that a clear abuse of discretion and no adequate remedy by appeal were the two requirements to entitle a party to mandamus relief).

B. *Mandamus to Compel a District Court to Proceed to Judgment and to Enforce Its Own Jurisdiction*

Justices Wheeler's dictum concerning the issuance of mandamus in the case of an abuse of discretion was soon forgotten as the supreme court turned its attention to developing its statutory authority to issue mandamus to compel a district court judge to proceed to judgment in a cause.[72] The first significant case involving the use of mandamus to compel a court to enter a judgment was *Lloyd v. Brinck*.[73] *Lloyd* involved a suit to recover $18,000 allegedly owed under the terms of a promissory note.[74] Following the trial of the case, the jury returned a general verdict[75] in proper form for the plaintiff awarding the sum sought plus interest.[76] After the receipt of the verdict, the trial judge "*ex officio* refused to enter up a judgment, but set [the] verdict aside, and ordered a new trial."[77] An original proceeding was filed in the supreme court—praying that mandamus be issued to compel the district judge to render a final judgment according to the verdict.[78] The court initially determined that an appeal from a final judgment on the retrial would be an inadequate legal remedy.[79] The court then rather perfunctorily held that the relator was

72. *See* Act approved May 12, 1846, 1st Leg., R.S., § 21, 1846 Tex. Gen. Laws 249, 255, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1555, 1561–1562 (Austin, Gammel Book Co. 1898) (providing that the supreme court could issue writs to enforce its jurisdiction and to compel district court judges to proceed to trial and judgment).

73. Lloyd v. Brinck, 35 Tex. 1 (1871) (orig. proceeding).

74. *Id.* at 2.

75. While the case does not specifically state that the jury returned a general verdict, one later case stated this as a fact. *See* First Nat'l Bank of Rule v. Chapman, 255 S.W. 807, 809 (Tex. Civ. App.—Fort Worth 1923, orig. proceeding) (relating that in *Lloyd* the jury had returned a general verdict for the plaintiff).

76. *Lloyd*, 35 Tex. at 2.

77. *Id.* at 8 (emphasis in original).

78. *Id.* at 2–3.

79. *Id.* at 9. The court asserted that the remedy was inadequate in these terms:

> In the cause at bar, we have no reason to reflect upon the motives or intentions of the court in setting aside the verdict of the jury, and believe that the action of the judge was prompted by a desire to administer strict and impartial justice; but we are unable to measure the damages which may have already resulted to the plaintiff or defendant, or which may arise before another trial could be had. And if we adopt the proposition, that the district court has *ex officio* unlimited control over every verdict of the jury, then we must admit the possibility that on the next trial the verdict of the jury and the ruling of the court will be the same as before, and might continue thus, to the total denial of justice. We are therefore forced to the conclusion that an appeal on a final judgment in this case (if such judgment ever be reached) would not be an adequate legal remedy, and that therefore the party had a right to resort to another and more complete remedy.

Id. at 8–9. Since the time of the Republic of Texas, mandamus would only issue when a party "having a specific legal right has no other legal operative remedy." Bradley v. McCrabb, Dallam 504,

entitled to mandamus, as the entry of the judgment on a proper verdict was a mere ministerial duty[80] that involved no discretion.[81] Specifically, the court stated:

> If, therefore, the verdict of the jury was, in this case, in proper form, and responsive to the issues presented by the pleadings, we are of the opinion that it relieved the court of any discretion, or revisory power over it, notwithstanding it may have been against the weight of evidence, or the law as given by the court. Juries may, and undoubtedly do, commit many errors, and render unjust if not oppressive verdicts; but the law has provided a corrective for every error, and the party aggrieved may, through a motion for a new trial, or in arrest of judgment, call forth the judicial powers of the court to prevent a wrong, and to secure the administration of law and justice. This appears to be the positive requirement of the law, made mandatory by our statutes.[82]

Thus, once a verdict had been returned, in proper form and responsive to the issues presented by the pleadings, the court must "enter the judgment in conformity therewith, notwithstanding an injustice may [be] done thereby."[83]

506 (Tex. 1843); *see also In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding) (explaining that one of the requirements for a mandamus to issue was that there was no adequate remedy by appeal); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (citing over twenty cases from 1890 to 1991 in support of the court's statement that "mandamus will not issue where there is an adequate remedy by appeal"); *cf.* Arberry v. Beavers, 6 Tex. 457, 464 (1851) (noting that mandamus was available when the law did not provide another adequate remedy).

80. *See Lloyd*, 35 Tex. at 9 (stating that the entry of a judgment on a verdict was a ministerial act that involved no judicial discretion).

81. *Id.* The court observed that after the court entered the judgment, the aggrieved party could file a motion "to determine the correctness or invalidity of the judgment." *Id.* at 8. The court concluded by asserting that it was statutorily authorized to issue a mandamus in this case. *Id.* at 10. Almost fifty years later, Presiding Judge Powell of the Commission of Appeals acknowledged that there was an unbroken line of Texas Supreme Court cases that had consistently held that there was no discretionary power in a judge to set aside a jury "verdict in proper form and responsive to the issues presented by the pleadings and submitted to them by the court." Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 543, 285 S.W. 296, 299 (1926) (orig. proceeding). The *Canty* court reasoned that entry of judgment upon a proper verdict was purely a ministerial act. *Id.*

82. *Lloyd*, 35 Tex. at 7–8. The statutes to which he was referring were the statutes enacted in 1846 dealing with the verdict and the motion for new trial. *See generally* Act approved May 13, 1846, 1st Leg., R.S., §§ 104–109, 112, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898) (providing, in part, that the verdict of twelve men would not be set aside for form; that a special verdict could be rendered and that if it was it would be conclusive as to the facts found; that new trials could be granted on the terms and conditions imposed by the court; and providing the time for filing the motion for new trial as well as providing that it had to be determined in the term in which it was filed).

83. *Lloyd*, 35 Tex. at 7. In an earlier case Justice Wheeler had bluntly pronounced this very point in the following words:

However, the *Lloyd* court noted that this general principle was subject to an exception.[84] The court stated that exception as follows:

> It is true that the law makes it the duty of the jury to decide the issues presented by the pleadings, and the law as given them by the court; and where the jury, in violation of their solemn oaths, fin[d] a verdict upon issues not presented, or where they find their verdict upon a portion only of the material issues presented, or where the verdict itself is fatally defective, in either case the verdict would be void, and no judgment could be entered. It is also believed, that should a jury find a verdict without any evidence to support it, the court would be justified in treating it as a nullity.[85]

Thus, the statutory authority of the supreme court to issue mandamus to compel a district court to enter a judgment had a limitation—the verdict could not be defective, and had to be proper, valid, and complete.[86] It was left to later supreme court decisions to apply the general principle and its limitation in the area of alleged irreconcilable conflicts in the jury's answers to special issues or questions.[87]

> For it is upon that which the jury have found—not what they might or ought to have found—that the court proceeds to render judgment. . . . If the court might look to the evidence, outside of the finding[s] of the jury, for [the] facts on which to give judgment, the verdict might be wholly disregarded, and the right of trial by jury defeated.

Claiborne v. Tanner, 18 Tex. 68, 79 (1856).

84. *Lloyd*, 35 Tex. at 7.

85. *Id.*

86. *Id.*

87. To more fully understand the historical development of the ability of the supreme court to compel a district court to proceed to judgment on a valid verdict, a brief history of the Texas law of verdicts would be most useful. The first legislative enactment following statehood dealing with the practice in district courts contained two important provisions concerning the verdict. First, the law provided that a verdict would not be reversed because of form. Act approved May 13, 1846, 1st Leg., R.S., § 104, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898). The law also provided that in civil cases the jury may return a special verdict "in issues made up under the direction of the court." *Id.* § 108. While there was statutory authority for the district courts to give special verdicts, most cases were submitted requesting the jury to return a general verdict. *See* Galveston, H. & S.A. Ry. Co. v. Jackson, 92 Tex. 638, 50 S.W. 1012, 1013 (1899) (noting that in the event that no special direction was given to the jury, the jury "must return a general charge"); Darden v. Mathews, 22 Tex. 320, 325 (1858) (affirming a general verdict that merely stated "we, the jury, find for the plaintiff"); Wells v. Barnett, 7 Tex. 548, 586–87 (1852) (affirming the validity of a general verdict for the plaintiff). *See generally* Leon Green & Allen E. Smith, *Negligence Law, No–Fault, and Jury Trial—IV*, 51 TEX. L. REV. 825, 833 (1973) (stating that when the constitution of 1876 was enacted, the majority of negligence cases were submitted to the jury on a general charge with special instructions such that the jury returned a general verdict). The original 1876 constitution, in an effort to have all the existing laws reviewed and published as one complete body, required a digest of all laws be prepared and published every ten years. TEX. CONST. of 1876, art. III, § 43. In response to this provision, the legislature enacted legislation authorizing the governor to appoint commissioners to make a complete

Over the next decades, the supreme court continued to use its mandamus jurisdiction to compel courts to enter judgments on valid verdicts.[88] However, the supreme court had no authority to direct a trial

revision and digest of the laws of Texas, and to embody their work into two bills—one dealing with criminal law, the other with civil law to present to the legislature for its consideration. *See* Act approved July 28, 1876, 15th Leg., R.S., ch. LX, § 1, 1876 Tex. Gen. Laws 58, 58, *reprinted in* 8 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 894, 894 (Austin, Gammel Book Co. 1898) (authorizing the commissioners appointed to revise the existing laws and to make recommendations as to what laws ought to remain in effect). On January 1, 1879, the appointed commissioners submitted to the legislature a proposed bill to adopt and establish the revised civil statutes of Texas. TEXAS, *Introduction* to *Revised Civil Statutes of the State of Texas* i (Galveston, A.H. Belo & Co. 1879). The bill included all civil statutes revised and arranged in alphabetical order under topics. *Id.* The bill was approved by the legislature with slight amendment on February 21, 1879, to be effective on September 1, 1879. *Id.* at ii. These revised statutes incorporated the then existing practice of submitting the case to the jury by general verdict or special verdict. *See* Act approved Feb. 21, 1879, 16th Leg., R.S., Title XXIX, ch. 17, art. 1328, TEXAS, *Revised Civil Statutes of the State of Texas*, at 213, 213 (Galveston, A.H. Belo & Co. 1879), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version TEX. R. CIV. P. 277) (stating that "whenever feasible" the court shall submit the charge in broad form questions). For the first time the statutes of Texas specifically defined the two verdicts. The statutes used the following language:

> A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to them. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court.

Id. Title XXIX, ch. 13, arts., 1329, 1330, at 209, 209. However the preference for general verdicts began to wane in 1913 when the legislature enacted legislation that required the judge upon request of a party to the litigation to submit the case to the jury upon distinct and separate special issues. Act of Mar. 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, 113, *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version TEX. R. CIV. P. 277) (stating that the court shall submit the charge in broad form questions "whenever feasible"). The effect of such legislation was to virtually eliminate the general charge from civil litigation. *See, e.g.*, Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273, 277 (1955) (noting that since 1913 the special issue practice in Texas has virtually replaced the general verdict in Texas). On January, 1, 1988 the term "special issues" in Rule 277 relating to the submission of the charge to the jury was replaced with the word "questions." TEX. R. CIV. P. 277, 50 TEX. B.J. 865 (1987, amended 1988).

88. *See* Aycock v. Clark, 94 Tex. 375, 60 S.W. 665, 666 (1901) (orig. proceeding) (stating that mandamus would issue to compel a judge to enter a judgment on a verdict); Hume v. Schintz, 90 Tex. 72, 36 S.W. 429, 430 (1896) (orig. proceeding) (noting that it was the duty of the judge "to give judgment according with the verdict"). However, the court recognized that the trial judge had a certain discretion when entering a judgment on a special verdict. One court put it in these words:

> On a general verdict the judge has nothing to do but simply enter upon his docket the fact of the return of the verdict, and judgment follows as a matter of course, but in case of special verdict the judge receives the verdict and passes upon it, determining what the judgment shall be, and renders judgment thereon; that is, pronounces the judgment which the clerk shall enter upon record. The reason is plain. Upon a general verdict for the plaintiff or defendant there is no need for any action of the court, as the law determines what the judgment shall be; but, in case of special verdict, the facts being found by the jury, it is necessary for the court to

court to enter a specific judgment.[89] In *Aycock v. Clark*,[90] the court was asked to issue mandamus to compel a district judge to enter a particular judgment in the case.[91] *Aycock* was a suit to recover damages for the construction and operation of a railroad and for an injunction to enjoin the use of the railroad tract for carrying freight.[92] The jury entered a general verdict in favor of all the defendants but one, and entered a general verdict in favor of the plaintiffs against one defendant for the sum of seven hundred and fifty dollars.[93] The court entered a judgment on the verdict,[94] refusing to enter the judgment that the plaintiffs had submitted that would have enjoined all defendants from using the tract for hauling freight.[95] The plaintiffs then filed a petition for mandamus to compel the trial court to enter a specific judgment in their favor.[96] The supreme court refused to grant mandamus relief, holding:

> A judge may be commanded to proceed to the trial of a case. So, also, he may be compelled to enter a judgment upon the verdict of a jury, *where he has refused to enter any judgment whatever*. But the determination of what is the proper judgment to be entered upon a verdict calls for the exercise of judicial discretion, and that discretion cannot be controlled by another court by a writ of mandamus.[97]

announce the judgment, the legal conclusion thereon, because the law is not determined by the special verdict, nor are the rights of the parties fixed thereby.

Carwile v. William Camerson & Co., 102 Tex. 171, 114 S.W. 100, 102 (1908). In the *Carwile* case, the court, in answering a certified question from the court of civil appeals, observed that the practice under the law was that the clerk entered the judgment on a general verdict without a formal announcement from the court. *Id.* at 103. If for some reason the clerk failed to perform his duty during the term, the judge at a subsequent term was authorized to enter a judgment nunc pro tunc. *Id.*

89. *Aycock*, 60 S.W. at 666.

90. Aycock v. Clark, 94 Tex. 375, 60 S.W. 665 (1901) (orig. proceeding).

91. *Id.* at 666.

92. *Id.*

93. *Id.*

94. *Id.* Since the plaintiffs had remitted all but one dollar of the damages awarded, the court entered a judgment in favor of the plaintiffs against the one defendant for one dollar and costs of suit. *Id.*

95. *Id.* (proposing also that one of the defendants restore its rail tract so as not to infringe upon the sidewalk adjacent to plaintiffs' lots).

96. *Id.* at 666 (seeking to have the court command the "judge to perform his statutory ministerial duty by entering a judgment declaring the said railroad a nuisance, and ordering the same removed—that is to say, the tracks, poles, and wires–from off the plaintiffs' said lots 5 and 6, described in plaintiffs' petition").

97. *Id.* (emphasis added) (internal citations omitted). The court then asserted that it "compels judgment, but does not control it." *Id.*; Ewing v. Cohen, 63 Tex. 482, 483 (1885) (stating that a writ of mandamus could not be used to dictate the judgment that the trial court is to enter). The *Aycock* court also noted that there was another "insuperable objection" to granting the mandamus relief in

Thus, the court held that, as the trial court had in fact entered a judgment in the case, "we are without power in this [mandamus] proceeding to correct that judgment, even if erroneous."[98] However, the court acknowledged that as a judgment had been entered in the case, the plaintiffs could seek a correction of the judgment by ordinary appeal in the court of civil appeals.[99]

C. *Mandamus to Compel a District Court to Enter Judgment in the Case of Alleged Irreconcilable Jury Answers*

While *Lloyd* and its progeny established the general rule that the supreme court had the authority to compel a trial court to proceed to judgment following the rendition of a proper verdict, the court soon became enmeshed in the determination of what was a proper verdict.[100] The issue raised its head in cases submitted to the jury on special issues where there were allegations that an irreconcilable conflict in the jury's answers made it impossible for the trial court to enter a judgment on the verdict.[101] The first significant case dealing with this matter was *Gulf,*

this case—the final judgment entered in the case was subject to an appeal, which was an adequate legal remedy. *Aycock*, 60 S.W. at 666. *But see Ewing*, 63 Tex. at 485 (stating that just because there was no adequate legal remedy, mandamus would not issue).

98. *Aycock*, 60 S.W. at 666.

99. *Id.*

100. *See generally* Emp'rs Reinsurance Corp. v. Holland, 162 Tex. 394, 347 S.W.2d 605, 607 (1961) (orig. proceeding) ("We conclude that the jury's answers to special issues Nos. 2 and 6 cannot be reconciled . . . and the order of mistrial was proper.").

101. If in fact there was an irreconcilable conflict it would be impossible to enter a valid verdict. Thus, the trial court's order of mistrial would not be subject to mandamus relief as there was no logical way the trial court could proceed to a judgment. *See id.* (holding that as the trial court's determination of an irreconcilable conflict in jury answers was correct and its order of mistrial proper, mandamus would not issue); Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296, 300 (1926) (orig. proceeding) (noting that judicial discretion would be involved in the case of reasonable doubt as to the existence of a conflict in the jury's answers).

It should be noted that it is the obligation of the trial court to use all means in an attempt to reconcile apparently conflicting answers so that the court may enter a judgment on the verdict. The supreme court has recently addressed the trial court's duty in the case of alleged conflicting answers in the following words:

> The threshold question in reviewing jury findings for fatal conflict is "whether the findings are about the same material fact. In making this determination, courts have a "duty to harmonize jury findings when possible." Courts must uphold jury findings if "there is any reasonably possible basis upon which they may be reconciled." The inquiry does not end, however, if the court determines that the findings create a conflict about the same material fact. The court must determine whether the conflict is fatal to the entry of judgment. . . . To determine whether a conflict is fatal, "the court must consider each of the answers claimed to be in conflict, disregarding the alleged conflicting answer but taking into consideration all of the rest of the verdict, and if, so considered, one of the answers would require a judgment in

Colorado & Santa Fe Railway Co. v. Canty.[102] In *Canty*, the plaintiff was seeking to recover damages for serious injury to his right eye as a result of the alleged negligence of the defendant.[103] Following the return of the verdict, the defendant moved for judgment on the verdict as the jury had absolved it of negligence,[104] while the plaintiff filed a motion for mistrial alleging inconsistencies in the jury's answers to the special issues.[105] The order of the court, refusing to enter judgment on the verdict and granting the mistrial, stated that the *sole* ground for doing so was an irreconcilable conflict in the jury's answers.[106] The defendant filed an application for mandamus requesting the supreme court to compel the trial judge to enter judgment on the verdict.[107] The case was referred to the commission of appeals for review and recommendation.[108] That court admitted that it

> favor of the plaintiff and the other would require a judgment in favor of the defendant, then the answers are fatally in conflict. . . ." Thus, to satisfy this test, the party claiming conflict must show that one of the conflicting findings "necessarily requires the entry of a judgment different from that which the court has entered. . . . Findings can be inconsistent or in conflict, or even in irreconcilable conflict, and still not be fatal to the entry of judgment.

Arvizu v. Estate of Puckett, 364 S.W.3d 273, 275–76 (Tex. 2012) (per curiam) (citations omitted).

102. Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296 (1926) (orig. proceeding).

103. *Id.* at 297.

104. *Id.* at 298.

105. *See id.* (asserting also that the unlearned men of the jury were confused and thought that their answers were sufficient for the plaintiff to recover the damages the jury found).

106. *Id.*

107. *Id.* at 299. At this time the law specifically authorized the supreme court to issue mandamus to compel a district judge to proceed to trial and judgment "agreeable to the principles and usages of law." Act approved Mar. 18, 1925, 39th Leg., R.S., Title 42, ch. 8, art. 1734, *reprinted in* I TEXAS, *Revised Civil Statutes of the State of Texas*, at 496, 498 (Austin, A. C. Baldwin & Sons, 1925). This statutory authority had its inception in early statehood. *See* Act approved May 12, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 249, 255–56, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1555, 1561–62 (Austin, Gammel Book Co. 1898) (providing that the supreme court could issues such writs "to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and uses of law"). The statutory authority of the supreme court to issue mandamus to compel judges to proceed to trial and judgment has remained inviolate since the original enactment. *See* TEX. GOV'T CODE ANN. § 22.002(b) (West Supp. 2013) (authorizing the supreme court to issues writs of mandamus to compel judges "to proceed to trial and judgment in a case agreeable to the principles and usages of law").

108. *Canty*, 285 S.W. at 299. The opinion of the commission of appeals was adopted by the supreme court. *Id.* at 302. By legislative mandate, the commission of appeals "considered and determined" the cases referred to it by the supreme court, and submitted its opinions, together with a "brief synopsis of the case" to the supreme court for further action. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 3, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, *The Laws of Texas* 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898). If and when adopted by the supreme court, the commission's opinions were to be published in the official reporter as the opinion of that court. *Id.* § 4. The Commission of Appeals was abolished in 1945, with the then judges of the commission of appeals becoming justices of the supreme court. Act of May 3, 1943, S.J.R. 8, § 1, 49th Leg., R.S.,

was "probably pioneering" in this case, as all the precedents for mandamus relief to compel a judge to enter a judgment on a verdict involved general verdicts.[109] However, it noted that since the jury failed to find the defendant negligent, "the verdict was just as effective for the defendant as would have been a general verdict for it."[110] Thus, relying on *Lloyd*,[111] and given the fact it was now admitted that there was no conflict,[112] the trial court had a ministerial duty to enter judgment on the verdict, and thus mandamus would issue.[113] The court stated its holding in the following words:

> In other words, the court having set aside the verdict, as expressly stated, solely because of "irreconcilable conflict" in the answers of the jury, then he had no right to do so if no such conflict in fact existed. If there were any

1945 Tex. Gen. Laws 1043, 1043–44 (adopted by election Aug. 25, 1945) (providing for a nine member supreme court with the former judges of the commission of appeals becoming supreme court justices).

109. *Canty*, 285 S.W. at 302. The revised civil statutes enacted in 1879 had for the first time included a provision that compelled the trial court to render a judgment on a special verdict, "unless the same be set aside and new trial granted." Act approved Feb. 21, 1879, 16th Leg., R.S., Title XXIX, ch. 13, art. 1333, *reprinted in* TEXAS, *The Revised Statutes of the State of Texas*, at 208, 209 (Galveston, A.H. Belo & Co., 1879), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of Mar. 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67 (current version at TEX. R. CIV. P. 300). By the time of the *Canty* case this 1879 provision had been recodified. Act of May 12, 1899, 26 Leg., R.S., ch. 111, art. 1333, 1899 Tex. Gen. Laws 190, 190. Although the statutory provision was recodified and amended from time to time the basic import has remained the same. Texas Rules of Civil Procedure 300 is the modern equivalent of this statute. It states: "Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding under these rules." TEX. R. CIV. P. 300. This 1879 statutory provision and its successors created a major distinction in the authority of the trial judge in cases where the jury returned a special verdict as opposed to a general verdict. Specifically, before a judge could consider a motion for new trial in a general verdict case, he had to enter the judgment; while in the case of a special verdict, the judge was authorized to grant a new trial without first entering a judgment. Mo.-Kan.-Tex. R.R. Co. of Tex. v. Brewster, 124 Tex. 244, 78 S.W.2d 575, 575–76 (1934).

110. *Canty*, 285 S.W. at 302 (holding that because the effect of the special verdict was clear, a writ of mandamus should issue just as it would in a general verdict case).

111. *Id.*

112. *Id.* at 300. Of course, the court itself determined that based upon a "mere reading" of the verdict, there was no conflict. *Id.* The alleged conflict was that the jury awarded the plaintiff $6,000 for his injuries, but had absolved the defendant of any negligence. *Id.* In his response to the mandamus petition, Judge Canty said nothing about the conflict, but stated that some jurors were told by other jurors "that the answers to issues in the charge were immaterial, so long as the jury could determine the injuries sustained by the plaintiff (respondent Wright) and award him compensation therefor." *Id.* Furthermore, during oral argument the respondents admitted that there was no conflict in the jury's answers. *Id.*

113. *Id.* at 302. It was obvious that the defendant had no adequate remedy at law as the order granting a mistrial and ordering a new trial were not appealable. *Id.* at 299.

> reasonable doubt as to whether or not there existed a conflict in the jury findings, then it might be said that the court could find such conflict in the exercise of judicial discretion. We are in sympathy with the universal rule of law which gives courts greatest latitude in the exercise of their discretion. But, where *there is clearly no conflict, there is no exercise of judicial discretion open to the court*, and the judge must perform his ministerial duty and enter judgment accordingly.[114]

Since the *Canty* decision, the supreme court has uniformly held that mandamus would issue to compel a district judge to enter judgment on a verdict involving special issues where the *sole* reason for refusing to do so was an erroneous determination of an irreconcilable conflict in the jury's answers to the charge.[115] For example, in *Cortimeglia v. Davis*,[116] suit was filed to collect on a vendor's lien note and to foreclose the lien on property.[117] Following the return of the verdict with special issues, both parties moved for judgment on the verdict.[118] However, the trial judge determined that the findings of the jury on the issues were in conflict and for that sole reason entered a mistrial, denying both motions for judgment.[119] The relator sought a writ of mandamus to compel the judge to enter a judgment in his favor on the verdict.[120] The commission of appeals began its opinion by outlining the law as set out in the statutes[121] as follows:

114. *Id.* at 300 (emphasis added).

115. *See In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 210 (Tex. 2009) (orig. proceeding) (stating that granting of a new trial was error if the basis for the action was an erroneous determination of an irreconcilable conflict in answers to jury questions); Indem. Ins. Co. of N. Am., 162 Tex. 260, 346 S.W.2d 830, 832 (1961) (orig. proceeding) (granting a mandamus compelling a trial court to enter judgment on the verdict after determining that the sole basis for the trial court's granting of a mistrial was an erroneous determination of an irreconcilable conflict in the jury's answers); Cortimeglia v. Davis, 116 Tex. 412, 417 292 S.W. 875, 876 (1927) (orig. proceeding) (issuing mandamus to compel trial court to enter judgment on the verdict as there was no conflict in the jury's findings).

116. Cortimeglia v. Davis, 116 Tex. 412, 292 S.W. 875 (1927) (orig. proceeding).

117. *Id.* at 875.

118. *Id.*

119. *Id.* at 876. The commission of appeals reviewed the order of the trial judge and concluded "that no reason, in the opinion of the [trial] court, existed for refusing to render judgment other than a conflict in the fact findings contained in the verdict." *Id.*

120. *Id.* Although not mentioned in the opinion, the case was referred to the commission of appeals for review and consideration. The opinion of the commission of appeals was adopted by the supreme court. *Id.*

121. *Id.* The key statutory provision for the court's determination in this case was article 2209 of the Texas Revised Civil Statutes of 1925, which provided that in cases submitted on a special verdict the court was to render judgment on the verdict unless the verdict was set aside or a new trial was granted. Act approved Mar. 18, 1925, 39th Leg., R.S., tit. 42, ch. 8, art. 2209, *reprinted in* I TEXAS, *Revised Civil Statutes of the State of Texas*, at 593, 593 (Austin, A. C. Baldwin & Sons, 1925).

> [T]he trial court in the exercise of discretion may set aside a verdict on special issues without having first rendered judgment thereon, and we are of opinion that it may do so, though no specific complaint is made by a party to the suit. The judge of the court, however, has no arbitrary right to refuse to enter judgment on a verdict which constitutes a finding on all the facts tendered in the pleadings necessary to the rendition of judgment. And, when it appears from the verdict itself and the order refusing to render and enter judgment thereon that such refusal is arbitrary and not based on the exercise of discretion, mandamus will lie to require entry of judgment. In such case the action of the judge is in effect a refusal to proceed to judgment in the trial of the cause.[122]

The court then reviewed the verdict and determined that the limitation title of the relator was supported by the findings of the jury.[123] The court noted that the jury's finding that the respondent had a lien on the property, which was the essence of the alleged conflict, was a conclusion of law and not of fact, and thus the jury had no authority to make such a finding; it could, therefore, be disregarded.[124] Thus, the court was of the opinion that the jury's answers could be reconciled; the reconciled findings fully supported the relator's claim to title to the land in question; and under the rule established in the *Canty* case, the trial court had no discretion but to enter judgment for the relator.[125]

However, shortly after *Cortimeglia*, the court limited the *Canty* holding to cases where a motion for new trial had not been filed.[126] The case that made this distinction was *Missouri-Kansas-Texas Railroad Co. of Texas v. Brewster*.[127] Following the trial of a personal injury lawsuit, the court submitted special issues to the jury.[128] The jury returned a verdict, and the defendant moved for judgment on the verdict while the plaintiff filed a motion for new trial complaining of several matters, including a complaint

122. *Cortimeglia*, 292 S.W. at 876.

123. *Id.*

124. *Id.*

125. *Id.* In this case, as there were no conflicting jury answers. the trial judge had the ministerial duty under the statute to enter judgment on the verdict as the judge had not set the verdict aside or entered a new trial.

126. *See* Mo.-Kan.-Tex. R.R. Co. of Tex. v. Brewster, 124 Tex. 244, 78 S.W.2d 575, 576 (1934) (orig. proceeding) (limiting the *Canty* holding—that mandamus issue upon finding the trial court arbitrarily refused to enter judgment on an undisputed verdict—to cases where no motion for new trial had been entered, since it is within the court's discretion to rule on motions entered for new trial).

127. Mo.-Kan.-Tex. R.R. Co. of Tex. v. Brewster 124 Tex. 244, 78 S.W.2d 575 (1934) (orig. proceeding).

128. *Id.* at 575.

that the jury's answers to the issues were conflicting.[129] Without ever entering a judgment, the trial court denied the defendant's motion for judgment on grounds of conflicting jury answers and granted the plaintiff's motion for new trial for the same reason.[130] The defendant filed an original mandamus proceeding in the supreme court to compel the trial court to enter judgment in its favor.[131] For the purpose of its opinion, the court assumed that the jury had returned a verdict in favor of the defendant and that there were no conflicting jury answers.[132] After reviewing the Texas authorities, the court stated:

> It has long been the rule of law of this state that this court will not review by mandamus the action of a trial court in granting a new trial unless his action in attempting to do so is *absolutely void*. This rule applies even though the court may expressly state erroneous reasons for granting the motion, if the motion itself is sufficient to invoke his jurisdiction.[133]

The court observed that the filing of the motion for new trial invoked the jurisdiction of the court and that the judge was authorized to rule on the motion.[134] The court then held: "This court cannot control by mandamus the action of a trial court in granting a motion for a new trial if he acts within his jurisdiction, even though he actually states erroneous reasons for his action."[135]

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129. *Id.* (seeking a new trial also on grounds of legal and factual sufficiency of the evidence).

130. *See id.* ("From the record we have stated it appears that the district court granted Thomas'[s] motion for a new trial from the verdict itself, without first entering the judgment called for thereby.").

131. *Id.* Although not mentioned in the opinion, the case was then referred to the commission of appeals for review and recommendation. The supreme court adopted the opinion of the court of appeals. *Id.* at 576.

132. *Id.* at 575.

133. *Id.* at 576 (emphasis added) (citations omitted). The court asserted: "Whether or not the motion stated a 'good cause' was a matter for the discretion and judgment of the trial court, and that discretion and judgment we cannot control nor direct by mandamus." Hunsinger v. Boyd, 119 Tex. 182, 26 S.W. 2d 905, 907 (1930) (orig. proceeding).

134. *Brewster*, 78 S.W.2d at 576 (relying on Article 2209 of the Revised Civil Statutes of 1925, which provided that in cases submitted on special verdict, the court was to render a judgment on the verdict unless set aside or a new trial granted).

135. *Id.* The court cited the supreme court case of *Hunsinger v. Boyd* for this proposition. *Hunsinger*, 26 S.W.2d at 905. The *Hunsinger* case involved a default judgment rendered against defendants who were cited by publication. The court granted the timely filed motion for new trial filed by the defendants; the relator sought to have the granting of the new trial set aside pursuant to a mandamus—in denying the mandamus, Chief Justice Cureton wrote:

> We have concluded, therefore, that the trial court had jurisdiction of the motion for new trial . . . . As to whether or not the trial court erroneously granted the motion for rehearing is a question over which we do not exercise jurisdiction by writ of mandamus. Whether or not the

The *Brewster* court distinguished the *Cortimeglia* case on grounds that in *Cortimeglia*, neither party invoked the jurisdiction of the court to act on a motion for new trial by only filing motions for judgment; and furthermore, neither party asserted that there were conflicting jury answers.[136]

Several years later, the court revisited the issue involved in *Brewster*. In *Southland-Greyhound Lines, Inc. v. Richardson*,[137] the jury, in response to special issues, found several of the defendant's actions while driving a bus to constitute negligence and to be a proximate cause of an accident; however, the jury also found that the plaintiff's actions constituted contributory negligence.[138] Following the receipt of the verdict, the defendant moved for judgment on the jury's answer to the verdict, while the plaintiff filed a motion seeking to set aside the verdict on several grounds, including an allegation that the findings of the jury were conflicting.[139] The judge granted the relief requested in the plaintiff's motion and in the court's order, described the plaintiff's motion as a motion to declare a mistrial.[140] The defendant then sought mandamus relief from the supreme court to compel the district court to enter judgment on the verdict.[141] The appellate court determined that the trial court's order for mistrial was based solely on its determination that the plaintiff was correct in asserting that there were conflicting jury answers that prevented the entry of a judgment for the defendant.[142] Thus, the court granted the petition for writ of mandamus to compel the trial court to enter judgment for the defendant, holding that the jury's findings were sufficient for the rendition of a judgment for the defendant and that there were no conflicting jury answers.[143] In distinguishing the *Brewster* case, the court said as follows:

> motion stated a "good cause" was a matter for the discretion and judgment of the trial court, and that discretion and judgment we cannot control nor direct by mandamus.

Id. at 907.

136. *Brewster*, 78 S.W.2d at 576. In *Cortimeglia*, the parties had only moved for judgments on the verdict and it was the trial judge who had sua sponte granted a new trial on grounds of conflicting jury answers. Cortimeglia v. Davis, 116 Tex. 412, 292 S.W. 875, 875–76 (1927) (orig. proceeding).

137. Southland-Greyhound Lines, Inc. v. Richardson, 126 Tex. 118, 86 S.W.2d 731 (1935) (orig. proceeding).

138. *Id.* at 732–33.

139. *Id.* at 733 (observing that the prayer contained in plaintiff's motion requested that the verdict be set aside and that a new trial be granted or a mistrial be declared).

140. *Id.*

141. *Id.* at 732. Although not mentioned in the opinion, the case was referred to the commission of appeals for review and recommendation. The opinion of the commission of appeals was adopted by the supreme court. *Id.* at 735.

142. *Id.* at 733.

143. *Id.* at 735 ("The verdict found all [the] facts [tendered in the pleadings] necessary [to] the

> The basis of the decision in *Missouri-Kansas-Texas* [*Railroad*] *Co. v. Brewster* is that the jurisdiction of the court (and, consequently, its judicial discretion) was invoked to pass upon a motion for new trial. Plaintiff's motion in this cause was not of such nature, and a determination of the motion, amounting merely to the entry of judgment or the refusal to enter judgment on the verdict, did not involve the exercising of judicial discretion.[144]

This distinction between the availability of mandamus relief in cases where new trials were granted and where mistrials were granted based upon an erroneous determination of conflicting jury answers followed directly from the supreme court's interpretation of it statutory mandamus power *vis-à-vis* the discretionary authority of the trial court given by statute in cases of special verdicts. Since 1879, the statutes required a trial court to enter judgment on a special verdict unless the verdict was set aside or a new trial was granted.[145] As the supreme court's statutory mandamus authority was generally viewed restrictively, its authority over district judges was limited to compelling them to perform the ministerial duties of proceeding to trial and judgment. Under the court's interpretation of the statutes, once a trial judge had entered a new trial, the supreme court was without jurisdiction to compel it to judgment, as the verdict had already been set aside.[146] In other words, mandamus would issue to compel the

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rendition of a judgment. . . . There were no conflicting findings with respect to any indispensible fact in issue.").

144. *Id.* at 734. A week later the commission of appeals reaffirmed the difference in the availability of mandamus relief between a trial court's granting a new trial or granting a mistrial in the following language:

> Respondents first question the right of this court to grant a writ of mandamus on the theory that the trial court granted a new trial, and its action in that regard cannot be reviewed . . . . The answer to this contention is that plaintiff in the trial court only asked for an order declaring a mistrial, and the judgment of the court, when construed as a whole, clearly shows that the court merely set the verdict aside and declared a mistrial, and did not grant a new trial from the verdict, as was done in the Brewster Case.

Swann v. Wheeler, 126 Tex. 167, 170, 86 S.W.2d 735, 737 (1935) (orig. proceeding) (citations omitted).

145. *See* Act approved Apr. 19, 1879, 16th Leg., R.S., ch. 111, § 1, 1879 Tex. Gen. Laws 119, 119, *reprinted in* 8 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1419, 1419 (Austin, Gammel Book Co. 1898) ("[I]n all cases where a special verdict of the jury is rendered . . . the court shall, unless the same be set aside and new trial granted, render judgment thereon."); *see also* Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296, 299 (1926) (orig. proceeding) (holding that the trial court must enter judgment when the jury renders a responsive, proper verdict on special issues).

146. *See* Hunsinger v. Boyd, 119 Tex. 182, 26 S.W.2d 905 (1930) (orig. proceeding) (explaining that the supreme court lacked jurisdiction to compel the trial court to judgment as the trial court had jurisdiction to, and did, grant a motion for new trial).

ministerial act of entering a judgment on a valid existing verdict, but once the granting of a new trial vitiated the verdict, mandamus relief was unavailable. However, as will be shown below, once mandamus jurisprudence expanded beyond the mere compelling of ministerial actions, the *Brewster* distinction became a relic of the past.

D. *Mandamus to Compel the District Court to Vacate an Order Setting Aside a Verdict and Granting a New Trial When Such Order Is Void*

The first case of significance dealing with the authority of the supreme court to issue mandamus when the trial court issued a void order granting a new trial was *Wright v. Swayne*.[147] *Wright* involved a title dispute over ownership of land in Tarrant County.[148] The case was tried on three separate occasions with each of the juries answering issues in favor of the defendants.[149] Following each trial, the plaintiffs filed a motion for new trial, attacking the jury's answers to the issues on factual insufficiency grounds as well as alleging errors by the trial judge.[150] All three plaintiffs' motions were granted.[151] Following the granting of the third new trial, the defendants filed their petition for mandamus, seeking to compel the trial judge to proceed to execute the judgment entered—before his granting of the third new trial—and pursuant to such judgment to name commissioners to partition the property in question.[152] The petition sought such relief primarily on the grounds that the judge was not authorized by statute to grant the third motion,[153] and his action in

147. Wright v. Swayne, 104 Tex. 440, 140 S.W. 221 (1911) (orig. proceeding). The court began its opinion by noting that "we have thought it proper to write our views at some length, and, in order to make the opinion of value as a precedent, as well as to make it easily understood, it is necessary to give some detailed statement of the case, the questions involved, and how they arose." *Id.* at 221.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* The order granting the third new trial merely recited that "after hearing [said] motion and being fully satisfied, etc., the motion is granted." *Id.* at 222 (internal quotation marks omitted).

152. *Id.* at 222.

153. *Id.* at 221–22 (referring to article 1372, Texas Revised Civil Statutes of 1895, which provided "'not more than two new trials shall be granted to either party in the same cause, except when the jury have been guilty of some misconduct or have erred in matter of law'"). Act approved Apr. 24, 1895, 24th Leg., R.S., Title XXX, ch. 17, art. 1372, *reprinted in* I TEXAS, *The Revised Civil Statutes of the State of Texas*, at 292, 293 (Austin, Eugene Von Boeckmann, 1895). That article was a codification of the original provision enacted in 1846 and was subsequently amended several times before being repealed by the Rules of Practice Act. Act approved May 13, 1846, 1st Leg., R.S., § 109, 1846 Tex. Gen. Laws 363, 392, *reprinted in* 2 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 1669, 1698 (Austin, Gammel Book Co. 1898), *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–02, *amended by* Act of March 5, 1941, 47th Leg., R.S., ch. 53, 1941 Tex.

granting that motion was therefore void.[154] In the judge's answer to the mandamus petition, he stated that his reason for granting the third motion for new trial was because he had erroneously admitted certain testimony that he believed "materially influenced the jury against the plaintiffs."[155] Therefore, the judge asserted that because he had granted the third new trial for an error of law, his action was not invalid under the statute.[156] Alluding to the discretion of the trial court in granting new trials, the court stated:

> It is a rule of universal application that this court would have no authority to issue the writ of mandamus to an inferior court, except in respect to the performance of a purely ministerial act. We are without power in a direct proceeding, such as this, to direct such court as to how it should proceed, or to control such court in respect to a matter involving the exercise of its judgment and discretion. We would be and are wholly without authority and power to grant the mandamus in this case, unless we should determine and hold that the action of the district court in undertaking to grant said motion for a new trial is *absolutely void in law*, and that the same is wholly of no effect. If we should so determine, it is not doubted or denied that petitioners would be entitled to the due execution of the judgment in their favor, and, if the court should willfully refuse to execute its own judgments according to their true intent and effect, we would have the authority, and it would be our duty, to direct [it] to proceed to execute the judgment and sentence of the law. Unless, however, the action of the court in undertaking to grant, and in granting, such third motion for new trial is *wholly and absolutely void*, then we are powerless to act, and this without reference to whether the ruling of the court in granting such motion was or was not justified under the law.[157]

The supreme court was clearly reaffirming its understanding that its mandamus jurisdiction was limited to compelling trial judges to perform purely ministerial acts.[158] The trial judge, while having significant

Gen. Laws 66, 66–67 (current version at TEX. R. CIV. P. 326) (stating that a party cannot be granted more than two new trials as a result of sufficiency or weight of the evidence).

154. *Swayne*, 140 S.W. at 221.

155. *Id.* at 222.

156. *Id.* In effect, the trial judge's argument was that the statute was not a flat prohibition against his granting the third motion for new trial in the event he did so because of his own error in law.

157. *Id.* (emphasis added).

158. *See* Cortimeglia v. Davis, 116 Tex. 412, 292 S.W. 875, 876 (1927) (orig. proceeding) ("And, when it appears from the verdict itself and the order refusing to render and enter judgment thereon that such refusal is arbitrary and not based on the exercise of discretion, mandamus will lie to require entry of judgment."); Gulf, Colo. & Santa Fe Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296, 299 (1926) (orig. proceeding) (indicating the supreme court could issue a mandamus to compel a district court to perform a ministerial act, but not to compel an act requiring the district court's discretionary

discretion in most of his judicial decision-making, did not have the jurisdiction, power, or capacity to enter an order that was void.[159] Thus, if the action of the trial court in granting a new trial was void—it being wholly a nullity and of no effect—the supreme court was statutorily authorized to compel the trial judge to vacate the void order and to carry out its ministerial duty of entering a judgment on the verdict, or enforcing the judgment that the trial court had set aside by the void order.[160] In the *Wright* case, the court denied the mandamus petition because it held that the trial judge's action was not in violation of the statute, but he had in fact, acted in a matter of judicial discretion.[161] The *Wright* court continued to adhere to the true historical roots of Texas mandamus jurisdiction in refusing to issue mandamus to correct a possible judicial

or judicial power); *Swayne*, 140 S.W. at 222 (stating the universal rule that the supreme court may only issue mandamus to compel lower courts to act when such actions are ministerial).

159. *See Swayne*, 140 S.W. at 222 (clarifying that the supreme court would have the authority and duty to compel the district court to enter judgment if it had entered a void order granting a new trial).

160. *See id.* (providing that if the district court had entered a void order in granting a new trial, the supreme court would have jurisdiction and an obligation to compel the court to enter judgment on the verdict, or to enforce the judgment if the trial court refused to do so).

161. *Id.* at 222–24. Although the trial judge had not given any reasons for granting the third new trial, as the motion stated several valid reasons, the court would presume that the trial judge granted the new trial on the basis of one of the valid reasons stated in the motion. *Id.* at 224. In addition, the court noted that the judge's response to the application provided a valid satisfactory explanation for his actions. *Id.* Furthermore, the court said that while neither the first nor third orders had given any grounds for the granting of the new trials, the second order granting a new trial stated that it was for errors of law and thus, "it is not clear that under any fair construction of the statute that the action of the court on the judgment [granting of the third new trial] is wholly invalid." *Id.* at 222–23. The court continued by noting that irrespective of this fact, the action of the court in granting the third new trial "was not in a legal sense void." *Id.* at 223. At this time the general understanding was that a trial court order was void if the court had no personal or subject matter jurisdiction. The supreme court had earlier stated: "The general rule is well established that a judgment rendered by a court even of general jurisdiction is void if it had, at the time of the rendition of the judgment, no jurisdiction of the person of the defendant or the subject-matter of the litigation. This principle is self-evident, because until the court acquires jurisdiction it has no power to proceed to investigate and determine private rights." Crawford v. McDonald, 88 Tex. 626, 631, 33 S.W. 325, 328 (1895). Of course, there were other situations at this time that would render a trial court's order void. *See* Chambers v. Hodges, 23 Tex. 105, 112–13 (1859) (holding that a judgment by a disqualified judge was void); Doss v. Waggoner, 3 Tex. 515, 516 (1848) (finding that the court had no jurisdiction to enter a judgment after its term expired—as such judgment would be void). In explaining what constitutes a void order, a recent supreme court opinion stated:

> A judgment is void only when it is clear that the court rendering the judgment had no jurisdiction over the parties or subject matter, no jurisdiction to render judgment, or no capacity to act as a court. Mere failure to follow proper procedure will not render a judgment void.

State *ex rel.* Latty v. Owens, 907 S.W.2d 484, 485 (Tex. 1995) (citations omitted). *See generally* Gus M. Hodges, *Collateral Attacks on Judgments*, 41 TEX. L. REV. 499, 505–25 (1963) (cataloguing the various situations where a judgment would be void).

error and reserving this extraordinary remedy for purely ministerial actions.[162] Since the *Wright* case, the court has consistently held that mandamus would issue to compel a trial court to vacate a void order. While the majority of these cases have involved a trial court's granting a new trial after its plenary power has expired,[163] there have been other situations where the court has granted mandamus relief to compel a trial court to vacate a void order.[164]

E. *Mandamus to Correct an Abuse of Discretion*

Today the Texas appellate courts recognize an abuse of discretion is one of the two fundamental requirements for the issuance of mandamus relief.[165] However, given the long history of Texas mandamus

162. *Swayne*, 140 S.W. at 222–24.

163. *See In re* Goss, 160 S.W.3d 288 (Tex. App.—Texarkana 2005, orig. proceeding) (holding that the order granting a new trial was void as it was signed after the court's plenary power had expired); *see also In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (per curiam) (stating that the granting of a new trial after the expiration of the court's plenary power was void); Faulkner v. Culver, 851 S.W.2d 187, 188–89 (Tex. 1993) (orig. proceeding) (per curiam) (providing that mandamus would conditionally issue to compel a trial court to set aside its order vacating a summary judgment signed after its plenary power had expired); Deen v. Kirk, 508 S.W.2d 70, 70 (Tex. 1974) (orig. proceeding) (granting mandamus to compel the trial court to set aside an order granting a new trial signed after the judgment was final); Universal Underwriters Ins. Co. v. Ferguson, 471 S.W.2d 28, 29 (Tex. 1971) (orig. proceeding) (holding a nunc pro tunc order making a non-clerical change after the plenary power had expired to be invalid). *See generally* Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973) (orig. proceeding) (per curiam) (noting the policy of the supreme court to exercise mandamus jurisdiction in cases involving void or invalid judgments).

164. *See, e.g.*, *In re* John G. and Marie Stella Kenedy Mem'l Found., 315 S.W.3d 519, 522–23 (Tex. 2010) (orig. proceeding) (conditionally granting mandamus to compel a probate court to vacate its order that was void for lack of subject matter jurisdiction); Crouch v. Craik, 369 S.W.2d 311, 314 (Tex. 1963) (orig. proceeding) (holding an order enjoining the enforcement of a valid penal statute void for lack of authority); State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272, 275 (1939) (orig. proceeding) (indicating that a judge did not have the power to enjoin the enforcement of provisions of the penal code); Yett v. Cook, 115 Tex. 175, 268 S.W. 715, 718 (1925) (orig. proceeding) (finding that an injunction entered by a trial court that prohibiting a party from suspending a judgment through a supersedeas bond pending appeal was void).

165. *See In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding) (stating that generally mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (stating that mandamus would issue to correct an abuse of discretion when there was no adequate remedy by appeal). The other traditional prong necessary for an appellate court to issue a mandamus is that there is no adequate remedy at law. *See Columbia*, 290 S.W.3d at 207 (noting that in addition to a clear abuse of discretion for mandamus to issue there had to be no adequate appellate remedy); *In re* Ford Motor Co., 211 S.W.3d 295, 297–98 (Tex. 2006) (orig. proceeding) (per curiam) (reciting the two fundamental principles of mandamus jurisprudence as abuse of discretion and no adequate remedy by appeal); *In re* Tex. Dep't of Family and Protective Servs., 210 S.W.3d 609, 612 (Tex. 2006) (orig. proceeding) (stating the two fundamental principles of mandamus jurisprudence); *In re* Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 256 (Tex. 2005) (orig.

jurisprudence, this particular prong is relatively new. Historically, the general understanding was that mandamus was an extraordinary remedy that would not lie to correct acts of judicial discretion by courts or officials.[166] While there was dictum in a few cases noting that mandamus might issue for abuses of discretion or arbitrary acts,[167] the cases generally held that mandamus was limited to compelling a court or an official to perform a ministerial act.[168] In the 1956 case of *Womack v. Berry*,[169] the court issued a writ of mandamus to correct a discretionary action of a trial judge for the first time.[170] *Womack* involved a suit by relator seeking to

proceeding) (referring to the two fundamental principles of mandamus jurisprudence). This second prong of mandamus jurisprudence has been part of Texas law since the time of the Republic. *See* Bradley v. McCrabb, Dallam 504, 507 (Tex. 1843) (stating that mandamus would issue "in cases where the party having a specific legal right has no other legal operative remedy").

166. *See Columbia*, 290 S.W.3d 204, 209 (referring to mandamus as an extraordinary remedy); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (acknowledging that mandamus was an extraordinary remedy); Munson v. Terrell, 101 Tex. 220, 105 S.W. 1114, 1115 (1907) (orig. proceeding) (stating that mandamus was "an extraordinary writ, and rests largely in the sound discretion of the court"); Ark. Bldg. & Loan Ass'n v. Madden, 91 Tex. 461, 44 S.W. 823, 824 (1898) (orig. proceeding) (stating that mandamus was a remedy of last resort); Hous. Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 329 (1859) (referring to mandamus as an extraordinary remedy).

167. *See Yett*, 268 S.W. at 719 (noting that mandamus may "be employed to prevent an abuse of discretion, or an act outside the exercise of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion"); Meyer v. Carolan, 9 Tex. 250, 255 (1852) (Wheeler, J., concurring) (arguing that in the case of a gross abuse of discretion mandamus might issue); Arberry v. Beavers, 6 Tex. 457, 472 (1851) (stating in dictum that mandamus would issue to correct a gross abuse of discretion when there was no other adequate remedy at law).

168. In the case of Lloyd v. Brinck, the court acknowledged:

> That a writ of mandamus will issue to an inferior court to compel the performance of a certain and positive duty, made mandatory by law, or where the duty is simply ministerial and involves no judicial discretion has been decided and settled in nearly every state of the union, and in the supreme court of the United States, as well as the courts of England.

Lloyd v. Brinck, 35 Tex. 1, 10 (1871) (citations omitted); *see also* Little v. Morris, 10 Tex. 263, 267 (1853) (stating that mandamus would not control a court in a matter that involved the exercise of discretion); Comm'r of Gen. Land Office v. Smith, 5 Tex. 471, 478 (1849) (stating that it was a well–settled principle that a government official was not subject to mandamus unless the duty to be performed was ministerial). In 1925, Chief Justice Cureton listed the various situations where the Texas Supreme Court granted mandamus, which included: to compel a court to proceed to trial and judgment; to enter a judgment on a valid verdict; to enforce a judgment which had not properly be superseded; to compel a judge to vacate a void order granting new trial and to enforce the judgment; to compel a court to perform a legal duty; and noting that it had authority to issue writs to vacate a district court's entry of mandamus where such was proper under the law. *Yett*, 268 S.W. at 719–21.

169. Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677 (1956) (orig. proceeding).

170. *Id.* at 683. The court stated that it had not found a Texas case where the writ of mandamus had been issued "to correct the action of an officer or tribunal in a matter of discretion." *Id.* Notwithstanding this broad statement, the supreme court had once before issued a mandamus upon a determination that a trial court had abused its discretion. S. Bag & Burlap Co. v. Boyd, 120 Tex 418, 431, 38 S.W.2d 565, 570 (1931) (orig. proceeding) (issuing a mandamus to compel a trial

take possession and manage trust assets for three minors under the terms of a will appointing relator as successor trustee.[171] The relator's right to possession was challenged by the trust beneficiaries.[172] One of the beneficiaries, having been recently inducted into the military, moved to stay all the proceedings until he had completed his four years of service.[173] In response to the motion to stay, the relator requested that the stay be denied, or in the alternative that the court grant a separate trial of the claims of that beneficiary and stay only those proceedings.[174] The trial court denied relator's request for a separate trial and stayed all proceedings.[175] The supreme court reviewed the facts and circumstances of the case,[176] and it determined that the trial court had been under a duty to order the separate trial as there was no room for the exercise of discretion in this matter.[177] The court enunciated this ministerial duty principle in the following words:

> When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or

court to modify an overbroad discovery order). The *Womack* court noted that several earlier cases had recognized the possibility that the writ could issue to correct an official or tribunal in a matter of discretion. *Womack*, 291 S.W.2d at 682–83. Three years after *Womack*, the supreme court further refined the concept of the limitation on the discretionary power of the trial court in these terms: "When it is once decided that a trial judge exercising a 'discretionary' authority has but one course to follow and one way to decide then the discretionary power is effectually destroyed and the rule which purports to grant such power is effectively repealed." Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (1959).

171. *Womack*, 291 S.W.2d at 681.

172. *Id.* The three beneficiaries of the testamentary trust were to receive their portion of the trust assets upon reaching the age of twenty-one. *Id.* at 679.

173. *Id.* at 681. Servicemen who were a party to litigation could under certain circumstances receive a stay of litigation. Soldiers' and Sailors' Relief Act of 1940, ch. 888, § 201, 54 Stat. 1178, 1181 (codified as Servicemembers Civil Relief Act at 50 U.S.C. § 522 (2006)). The beneficiary who had been inducted into the service sought to recover damages from the relator and to recover property from some of the other defendants. *Womack*, 291 S.W.2d at 681.

174. *Womack*, 291 S.W.2d at 681. After the filing of the stay, all claims against the beneficiary who had requested the stay were dismissed by the relator. *Id.* However, that beneficiary's claims against the relator were unaffected by the non-suit. *See* TEX. R. CIV. P. 162 (providing that the taking of a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief").

175. *Womack*, 291 S.W.2d at 681. A writ of mandamus was sought by the relator from the court of appeals, which was denied without opinion. *Id.*

176. *Id.* at 679–83. The most significant facts supporting the supreme court's decision were that the relator was no longer seeking any affirmative relief from the beneficiary, that the beneficiary was not disputing the relator's right to be trustee of the two remaining minor children, and that none of the claims of the beneficiary would be affected in the separate trial of the relator's action. *Id.* at 683.

177. *Id.* at 683.

> circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.[178]

Thus, the court's refusal to grant a separate trial was characterized by the supreme court as "a clear abuse of discretion" and a "violation of a plain legal duty" for which mandamus would lie.[179]

The formulation from *Womack* of the abuse of discretion standard opened a new door for Texas mandamus jurisprudence. No longer was mandamus limited to compelling purely ministerial actions, the *dictum* of earlier cases had now become a firm legal precedent establishing the principle that mandamus might issue in those situations where a trial court abused its discretion.[180] However, the operative word "abuse" was not

178. *Id.*

179. *Id.* Finally, almost as an afterthought, the court stated that the relator had no adequate legal remedy by way of appeal. *Id.* The court noted that by the time the stay was lifted following the four years of military service and the case tried, all of the beneficiaries would be over twenty-one and entitled to the trust assets and thus, relator would never have "a judicial determination of his right and duty to administer the property left in trust for the minors." *Id.* The dissent asserted that mandamus relief should be denied as the trial judge's action was in the realm of discretion. *Id.* at 685 (Griffin, J., dissenting). However, the dissent was of the opinion that the court was authorized to issue mandamus in the case of a clear abuse of discretion. *Id.* (Griffin, J., dissenting). But according to the dissent, such an abuse would only occur when the actions were the result of "fraud, caprice, or by a purely arbitrary decision, and without reason." *Id.* (Griffin, J., dissenting) (citing King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, orig. proceeding)). The *King* case involved an appeal from a mandamus issued by the district court to compel the health officer and board of commissioners of the City of San Antonio to license the construction and operation of a funeral home. King v. Guerra, 1 S.W.2d 373, 374 (Tex. Civ. App.—San Antonio, 1927, orig. proceeding). The court in that case noted that the general rule was that mandamus would not lie when the act complained of involved the exercise of discretion. *Id.* at 376. But the court asserted that there was an exception to the general rule when the official acted "wholly through fraud, caprice or by a purely arbitrary decision and without reason." *Id.* The *King* court then noted that this gross abuse of discretion would be characterized by an act that was undertaken "in the absence of any fact or condition supporting or tending to support its conclusion in the matter acted upon." *Id.* at 376–77.

180. *Womack*, 291 S.W.2d at 683 (holding that mandamus would issue in a case where the trial judge abused his discretion). It should be noted that the *Womack* court, although drawing upon the dictum in *Arberry* and *King*, substituted the term "clear abuse" for the *Arberry* concept of "gross abuse" and clearly did not evaluate whether the order of the court denying a separate trial was motivated by the *King* factors of fraud, caprice, or was an arbitrary decision without any reason. It would remain for future cases to determine whether this change to a more liberal standard was accidental or motivated by a desire of the supreme court to become more directly involved in trial court decision-making. Some commentators saw the *Womack* court's formulation of the clear abuse of discretion standard as a rejection of the standards of *Arberry* and *King*. *See* David W. Holman & Byron C. Keeling, *Entering the Thicket? Mandamus Review of Texas District Court Witness Disclosure Orders*, 23 ST. MARY'S L.J. 365, 393 (1991) (asserting that the *Womack* court's abuse of discretion standard was an "apparent rejection" of the stricter formulations of *Arberry* and *King*).

given a comprehensive definition or explanation by the *Womack* court; so it would be left to later courts to define or explain its meaning, or to merely to determine on a case-by-case approach whether a specific act or failure to act constituted an clear abuse of discretion authorizing the court to issue mandamus relief.[181]

In the years following the *Womack* decision, the court began to use the new abuse of discretion standard to intervene in different aspects of the trial court's discretionary activities. Shortly after *Womack*, in *Crane v. Tunks*,[182] the court used the new standard in a discovery context.[183] *Crane* involved a suit to recovery title to land.[184] During the course of the litigation, the plaintiff filed an application for a bill of discovery asking that the defendant produce for his examination certain books and records.[185] Following a hearing on the relevancy and materiality of the requested documents, the trial court denied the production of some documents, but ordered the production of a tax return without examining it.[186] The defendant's lawyer was held in contempt for not producing the document; but the contempt order was stayed pending the resolution of the writ of

181. It is apparent from the cases since *Womack* that the supreme court uses the phrases "clear abuse of discretion" and "abuse of discretion" interchangeably, but distinguishes those phrases from the stricter phrase "gross abuse of discretion." *See In re* Frank Motor Co., 361 S.W.3d 628, 630 (Tex. 2012) (orig. proceeding) (observing that in the case of a clear abuse of discretion with no adequate legal remedy that mandamus relief was proper); *In re* Guar. Ins. Serv. Inc., 343 S.W.3d 130, 132 (Tex. 2011) (orig. proceeding) (stating that mandamus was warranted when there was a clear abuse of discretion and no adequate legal remedy); *In re* Puig, 351 S.W.3d 301, 303 (Tex. 2011) (orig. proceeding) (ordering that the trial court did not abuse its discretion in denying a plea to the jurisdiction); *In re* Columbia Med. Ctr. of Los Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding) (stating that the trial court's failure to give reasons for disregarding the jury verdict was an abuse of discretion); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (holding that an erroneous interpretation of the law was a clear abuse of discretion); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400, 401 (1989) (orig. proceeding) (noting that mandamus would issue as the trial judge's "failure to apply the proper standard of law to the motion to disqualify counsel was an abuse of discretion"); Crane v. Tunks, 160 Tex. 182, 192, 328 S.W.2d 434, 440–41 (1959) (orig. proceeding), *disapproved on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (noting that in the proper case mandamus would issue to correct a clear abuse of discretion).

182. Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959) (orig. proceeding), *disapproved on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding).

183. *Id.* at 439.

184. *Id.* at 435–36.

185. *Id.* at 436. Rule 737 stated in part that the trial court was to grant discovery "in accordance with the usages of courts of equity." TEX. R. CIV. P. 737, 3 TEX. B.J. 639 (1941, repealed 1999). In general, the documents that were requested under a bill of discovery had to be material to the case. *See, e.g.*, *Crane*, 328 S.W.2d at 440 (holding that relevancy and materiality should be shown in the application asking for the bill of discovery).

186. *Crane*, 328 S.W.2d at 437–38.

mandamus proceeding filed in the supreme court to contest the order.[187] Apparently realizing that the action of the trial judge fell in the realm of judicial decision-making and did not involve a ministerial action, the court focused entirely on determining if the trial court's order compelling production of the tax return could be characterized as a clear abuse of discretion.[188] The court determined that the trial court had an initial duty to examine the document, and then to order the production of only those portions of the document that were material and relevant to the case.[189] The court then held that the trial judge's failure to perform his duty in examining the document for relevancy and materiality constituted an abuse of discretion, and thus, mandamus would conditionally issue to compel the trial judge to perform his duty.[190]

Following the *Crane* case, the court continued to use the abuse of discretion standard in discovery cases whenever in the court's opinion the trial court had erred in either ordering overbroad discovery or refusing discovery of discoverable materials.[191] However, instead of developing a standard for what constituted an abuse of discretion that could be relied upon by trial judges in making their discovery decisions, the supreme court routinely reviewed the record and then merely recited that the trial court's

187. *Id.* at 438.

188. *Id.* at 440–41 (1959) (relying on the *Womack* case). The court obviously realized that the trial court's decision could only be characterized as a judicial act as opposed to a ministerial one, and thus the only way that mandamus could issue was to find an abuse of discretion.

189. *Id.* at 440.

190. *Id.* at 440–41. Although the majority opinion made no effort to explain what was meant by the term "abuse of discretion," the dissenting opinion stated that the trial judge's suspension of the contempt sentencing pending the determination of the mandamus proceeding was "not an abuse of discretion," as such decision was not the result of "fraud, caprice, or by a purely arbitrary decision, and without reason." *Id.* at 444. The court did not cite the earlier *King* case for this characterization of abuse of discretion; however, one cannot fail to see the similarity. *See King*, 1 S.W.2d at 376 (stating that acts that were the result of "fraud, caprice, or by purely arbitrary decision" constituted a gross abuse of discretion). The court had initially determined that the relator had no adequate remedy at law as an appeal would be totally ineffective. *Crane*, 328 S.W.2d at 439. Although the tax return was not privileged, once it was produced the party's right to privacy would be compromised and there was no way that an appeal would remedy the damage. *Id.* at 439.

191. *See* Stewart v. McCain 575 S.W.2d 509, 512 (Tex. 1978) (orig. proceeding) (finding a clear abuse of discretion in the trial court's order to produce documents that were absolutely privileged under state banking laws); West v. Solito, 563 S.W.2d 240, 244 (Tex. 1978) (orig. proceeding) (stating that a court order requiring the production of documents protected by the attorney–client privilege constituted a clear abuse of discretion); Barker v. Dunham, 551 S.W.2d 41, 46 (Tex. 1977) (orig. proceeding) (granting mandamus conditionally where a trial judge abused his discretion in denying discovery of certain properly discoverable information), *disapproved on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding); Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (orig. proceeding) (holding an order requiring the production of a whole tax return to be an abuse of discretion).

order was or was not an abuse of discretion.[192] The impression given by these decisions was that the Texas Supreme Court was merely substituting its opinion on the discovery issue for that of the trial court.[193] A prime example of this was *Jampole v. Touchy*.[194] The *Jampole* case was a personal injury case involving a post-collision, fuel-fed fire.[195] In *Jampole*, the trial court conducted an extensive hearing on several discovery matters.[196] The court then entered an order denying in part the plaintiff's request for production of certain documents from which order the plaintiff petitioned the supreme court for mandamus relief.[197] The trial court had denied some of the requested documents on grounds that they were not relevant to the plaintiff's cause of action.[198] The supreme court, after pronouncing that the purpose of discovery "was to seek the truth,"[199] determined that the trial court had taken a too-restrictive view in "balancing the rights of the parties."[200] The court determined that in its opinion the documents requested by the plaintiff were "clearly relevant information that is crucial to Jampole's cause of action."[201] The court therefore held that the trial court had abused its discretion in denying discovery of a certain document.[202] Justice Barrow, in his dissenting opinion, asserted that if this case involved a clear abuse of discretion "no trial judge is safe from the heavy hand of a mandamus action."[203] He continued by observing that in his opinion mandamus was not suitable to

192. *See* Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 511–12 (1990) ("Although the supreme court usually recites clear abuse of discretion in its mandamus decisions involving discovery, the court actually appears to determine whether a discovery order is right or wrong.").

193. One commentator suggested that the court had modified its stricter interpretation of what was meant by abuse of discretion so that it could substitute its own opinion on whether a particular discovery order was right or wrong. *See id.* (noting that although the court recites the abuse of discretion standard, the "court actually appears to determine whether a discovery order is right or wrong").

194. Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984) (orig. proceeding).

195. *Id.* at 569.

196. *Id.* at 577 (Barrow, J., dissenting) (noting that the court conducted an extensive hearing for two days resulting in over 300 pages of record).

197. *Id.* at 572 (denying discovery of various alternative design and assembly documents).

198. *Id.*

199. *Id.* at 573.

200. *Id.* The court noted that the broad grant of discoverable material needed to be balanced against the legitimate interests of the opposing party. *See id.* (listing the legitimate interest of the opposing party to include not having to disclose privileged information, not being harassed, and not being forced to respond to overbroad discovery requests).

201. *Id.* at 574.

202. *Id.*

203. *Id.* at 577 (noting that there had been a "full hearing by a conscientious trial judge").

many discovery issues, as the determination of what was or was not relevant could not be determined by a "fixed and prescribed course not involving the exercise of judgment or discretion."[204] Furthermore, his understanding of the new rules on discovery even authorized a judge to "limit the discovery of relevant evidence."[205] In conclusion, Justice Barrow lamented the increased incursion of the Texas Supreme Court into the trial process from which he saw no retreat.[206] In effect, he believed that the court was usurping the discretion of the trial judge and merely substituting its opinion of what was discoverable or not for that of the trial court.[207]

During the same period of time, the abuse of discretion standard was additionally given as the basis for the granting of mandamus relief in a few situations outside of the discovery context.[208] For example, in *State v. Sewell*,[209] a case involving lawyer discipline, a trial judge had entered an injunction preventing a grievance committee from conducting any further hearings on matters concerning a particular lawyer—which had been previously considered by the same committee on two other occasions.[210]

204. Jampole v. Touchy, 673 S.W.2d 569, 578 (Tex. 1984) (orig. proceeding) (Barrow, J., dissenting) (noting that the "concept of relevance is not susceptible of exact definition").

205. *Id.* (Barrow, J., dissenting) (referring specifically to the new rule dealing with protection orders, which provided in part: "ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified" (citing TEX. R. CIV. P. 166b(4)(a), 47 TEX. B.J. 10 (1984, repealed 1999) (current version at TEX. R. CIV. P. 192.6))).

206. *Id.* (Barrow, J., dissenting) (noting that the court was "failing to heed the warning" of earlier court opinions of "entering into the thicket" and had now "become totally enshrouded in that thicket").

207. *Id.* at 577 (Barrow, J., dissenting) (asserting that the court had "usurped the discretion of the trial court").

208. *See* State v. Walker, 679 S.W.2d 484, 486 (Tex. 1984) (orig. proceeding) (holding that the trial court abused its discretion in failing to follow the mandate of the supreme court); Johnson v. Ct. of Civ. App. for the Seventh Supreme Jud. Dist. of Tex., 162 Tex. 613, 350 S.W.2d 330, 331–32 (1961) (orig. proceeding) (observing that the court of civil appeals exceeded its authority in issuing a mandamus to compel a trial court to set aside a order granting a new trial), *disapproved in In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). However, since *Crane* the vast majority of mandamus proceedings filed in the supreme court alleging an abuse of discretion have involved discovery disputes. In fact, in *General Motors Corp. v. Lawrence*, the court noted that since *Crane* the court had been inundated with mandamus actions in the discovery area. Gen. Motor Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983) (orig. proceeding).

209. State v. Sewell, 487 S.W.2d 716 (Tex. 1972) (orig. proceeding).

210. *Id.* at 717–18. The committee had earlier conducted a hearing on a complaint concerning an alleged mishandling of funds that had resulted in the committee's filing of a formal disbarment proceeding. *Id.* at 717. It had also investigated another matter and decided not to undertake any disciplinary actions. *Id.*

The trial judge asserted that the grievance committee was barred by res judicata as the committee had previously met on these matters.[211] The grievance committee sought mandamus relief to compel the trial court to rescind its injunction.[212] The supreme court initially held that the earlier investigations, including the dismissal of a disbarment proceeding without prejudice, were not final decisions on the merits, and therefore, further proceedings on these matters were not barred by res judicata.[213] After reviewing some of the earlier mandamus cases, the court observed that the writ of mandamus could issue to compel the trial court to vacate an order, if the supreme court concluded that the issuance of that order was a clear abuse of discretion.[214] The court continued by stating: "In measuring the abuse of discretion, this court has looked with disfavor upon injunctive encroachments upon delegated administrative and executive powers which affect the state as a whole."[215]

The supreme court then stated that it was charged by law with the obligation to establish rules and regulations for lawyer discipline and that under the procedures it had established, grievance committees were its administrative agencies charged with the responsibility of carrying out the supreme court's professional policing duties.[216] In conclusion, the court held that the injunction granted by the trial judge interfered with the grievance procedures authorized by law and constituted a clear abuse of discretion.[217] This case, like most of the cases after *Womack* and *Crane*, merely identified after the fact what actions by a trial court would constitute an abuse of discretion, but provided no true guidance for trial judges as to what standards the Texas Supreme Court would use to evaluate the trial court's actions in the area of discretion.[218]

211. *Id.* at 718. The committee had previously been enjoined from holding any more hearings concerning this attorney following the filing of the disbarment proceeding without complying with the discovery rules of the rules of civil procedure. *Id.* at 717. Following that injunction, the committee took a non–suit without prejudice in the disbarment proceeding. *Id.* Following the dismissal, a new complaint was filed against the lawyer and the committee gave the attorney notice of a hearing on the new complaint. *Id.* Following this notice, the attorney sought and obtained an injunction prohibiting the committee from conducting any hearings concerning the two matters on which it had already held hearings. *Id.* at 717–18.

212. *Id.* at 717.

213. *Id.* at 718.

214. *Id.* (stating that there was a heavy burden imposed upon one who sought mandamus relief to compel a trial court to vacate an order).

215. *Id.*

216. *Id.* at 719.

217. *Id.*

218. The court's approach at this time was similar to United States Supreme Court Justice Stewart's approach to identifying hard–core pornography: "I know it when I see it." Jacobellis v.

However, in 1985, the supreme court articulated an objective standard that would identify what type of actions by a trial judge would be characterized as an abuse of discretion. In *Johnson v. Fourth Court of Appeals*,[219] the court was asked to issue a mandamus to compel the court of appeals to withdraw its mandamus compelling a trial court to rescind its order granting a new trial.[220] That case involved a suit against a security guard and the agency that provided security for an apartment complex at the time when a brutal rape and beating of the plaintiff occurred.[221] Following a trial, the case was submitted to the jury, which found that the guard's negligence was a proximate cause of the assault, but the agency's negligence was not a proximate cause of the assault.[222] The damage question, having been conditionally submitted, was not answered.[223] The plaintiff objected to the partial verdict and moved for a mistrial on the grounds that the jury's answers were conflicting and that the trial court erred in conditionally submitting the damage question.[224] The trial court granted her a mistrial, and the security agency sought mandamus relief.[225] The court of appeals conditionally granted the mandamus holding that there was no irreconcilable conflict in the jury's answers, and that the plaintiff had waived her right to trial of damages by failing to object to the conditional submission of the damages issue.[226] Thereafter, in response to the mandamus, the trial court granted judgment that the plaintiff take nothing.[227] The court then granted the plaintiff's motion for new trial.[228]

Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). While such an approach is instructive after the fact, it provides no guidance for a district court when a different fact situation comes before it. The end result of such an approach is ad hoc decision-making that allows the Texas Supreme Court to substitute its opinion for the trial court whenever it would have reached a different result.

219. Johnson v. Fourth Ct. of App., 700 S.W.2d 916 (Tex. 1985) (orig. proceeding), *disapproved of in In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding).

220. *Id.* at 916–17. The court noted that as a result of the expansion of its mandamus jurisdiction, it had to determine the proper standard of review in determining whether the court of appeals has abused its discretion. *Id.* at 917. (noting that the issue typically arises when a relator asserted that the court of appeals "abused its discretion in holding that the trial court had abused its discretion"). The court stated the meaning of "abuse of discretion," as applied to a trial court, differed from that of a court of appeal in the following words: "The discretion exercised by a trial court when ruling on an interlocutory matter is ordinarily quite broad, whereas the discretion exercised by an appellate court possessing mandamus power is much more confined." *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 918.

225. *Id.* at 917.

226. *Id.*

227. *Id.*

The security agency once again sought mandamus relief from the court of appeals.[229] The court of appeals granted mandamus relief, compelling the trial court to vacate the granting of the new trial because in its opinion the new trial had been granted for the same erroneous reasons that the mistrial had been granted.[230] The plaintiff sought mandamus from the Texas Supreme Court to compel the court of appeals to rescind its order.[231] The court began its analysis by stating that mandamus issued only to correct a clear abuse of discretion or the violation of a duty imposed by law when there was no other adequate legal remedy.[232] It then expounded on what actions by the trial court would constitute an abuse of discretion in the following words:

> A trial court, on the other hand, abuses its discretion when it reaches a decision so *arbitrary and unreasonable as to amount to a clear and prejudicial error of law*. A relator who attacks the ruling of a trial court as an abuse of discretion labors under a heavy burden. The relator must establish, under the circumstances of the case that the facts and law permit the trial court to make but one decision. This determination is essential because mandamus will not issue to control the action of a lower court in a matter involving discretion. . . . In order to find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter. . . . We make an independent inquiry whether the trial court's order is so *arbitrary, unreasonable, or based upon so gross and prejudicial an error of law* as to establish abuse of discretion. A mere error in judgment is not an abuse of discretion. . . . If the matter is truly one requiring the exercise of discretion, such discretion lies with the trial court. An appellate court may not substitute its discretion for that of the trial court.[233]

228. *Id.*

229. Johnson v. Fourth Ct. of App., 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding), *disapproved of in In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding).

230. *Id.* In the earlier mandamus proceeding, the court of appeals had held that there was no irreconcilable conflict in the jury's answers and that the plaintiff waived any complaint to the conditional submission of the damage issue. *Id.* at 917–18. Thus, the security agency asserted that it was an abuse of discretion for the trial court to grant a new trial on the basis of complaints that had already been determined to be erroneous. *Id.* at 918.

231. *Id.* at 918.

232. *Id.*

233. *Id.* at 917–18 (emphasis added) (citations omitted) (quoting Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (1959)). Just seven days earlier, the supreme court held that a trial court had not abused its discretion in striking the defendant's answer for discovery abuse and entering an interlocutory default judgment on liability, which had become final following a jury trial on damages. Downer v. Aquamarine Operators, 701 S.W.2d 238, 238–40 (Tex. 1985). In that case, the court announced a test for determining whether the actions of a trial judge would constitute an abuse of discretion in the following words:

Upon reviewing the record, the court noted that although the order did not state the grounds for the granting of the new trial, the record reflected that the new trial was entered in "total fairness of the entire case."[234] The supreme court conditionally granted mandamus relief stating:

> The record does not disclose that the new trial was granted on the same grounds previously overruled by the court of appeals. We hold that the trial court granted the new trial "in the interest of justice and fairness." This was not an abuse of discretion. Accordingly, the trial court's judgment should not have been disturbed.[235]

The *Johnson* court clearly articulated not once, but twice, what actions would be characterized as abuse.[236] The action by the trial court had to be arbitrary and unreasonable, or based on a gross error of law. The court was clearly rejecting the practice of merely concluding that an action was an abuse of discretion because the supreme court would have ruled differently than the trial court, and therefore was merely substituting its opinion for that of the trial court. In effect, the *Johnson* court was returning the abuse of discretion standard back to its historical roots.[237]

Following the *Johnson* case, the court applied its new understanding of the word "abuse" in a few cases,[238] before the court took another

> The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

Downer, 701 S.W.2d at 241–42.

234. *Johnson*, 700 S.W.2d at 918. In her motion for new trial, the relator presented the two grounds already overruled by the earlier decision of the court of appeals, but additionally prayed that in the interest of justice and fairness a new trial be granted. *Id.* Furthermore, at the hearing that led to the granting the motion for new trial, the judge had stated that she was granting the new trial in "total fairness of the entire case." *Id.*

235. *Id.* As the trial court had not abused its discretion in granting the new trial, by implication the court of appeals abused its discretion in ordering the trial court to vacate its order.

236. *See id.* at 917–18 (noting twice in the opinion that a trial court abuses its discretion when making a decision "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law").

237. Arberry v. Beavers, 6 Tex. 457, 472 (1851) (implying that mandamus would lie to "correct so gross an abuse of discretion"); King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio, 1927, orig. proceeding) (noting that mandamus would issue if the official "acted wholly through fraud, caprice, or by a purely arbitrary decision, and without reason").

238. *See* Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991) (orig. proceeding) (holding that the trial court abused its discretion by refusing to strike the testimony or prohibiting the calling of a sitting judge in direct contradiction to Canon 2 of the Code of Judicial Conduct); *see also* TransAm. Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918–19 (Tex. 1991) (orig. proceeding) (stressing that

opportunity to further expound upon the characteristics that would justify the court holding a trial court's actions were an abuse of discretion. In *Walker v. Packer*,[239] the court was faced with many discovery disputes that arose in a medical malpractice case.[240] One of those disputes gave rise to the court's discussion of what actions would constitute an abuse of discretion.[241] The plaintiffs sought discovery of documentary evidence solely for the impeachment of one of the defendants' experts in the case whose credibility had already been put in question.[242] The trial court denied the discovery request based on its interpretation of a former supreme court case, which it viewed as controlling on the issue.[243] The supreme court held that the trial court's erroneous interpretation of the court's earlier precedent constituted a clear abuse of discretion.[244] In doing so the court said:

> A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances. With respect to resolution of factual issues or matters committed to the trial

the trial court's actions in striking pleadings and entering a default judgment were manifestly unjust); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (arguing that the trial court abused its discretion by failing to apply the proper legal standard to a motion to disqualify counsel).

239. Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

240. *Id.* at 835–36.

241. The court noted that traditionally the use of the mandamus had been limited to compelling a ministerial duty or act. *Id.* at 839. The court then noted that since the early 1950s the court issued the writ to correct clear abuses of discretion. *Id.*

242. *Id.* at 837–38. One of the defendants' experts, who was on the obstetrics faculty at the University of Texas Health Science Center at Dallas, had testified that he was unaware of any of his department's policies that restricted faculty members from testifying for plaintiffs in medical malpractice lawsuits. *Id.* at 837. However, in a totally unrelated lawsuit, another member of the obstetrics faculty had testified that there was a written policy distributed to all obstetrics faculty that placed restrictions upon members of the obstetrics faculty from testifying for plaintiffs in medical malpractice cases. *Id.* at 838. Thus, according to the court, there was a possibility that the defendant's expert was biased. *Id.*

243. *Id.* at 838.

244. *Id.* at 840. The dispute centered around the proper interpretation of the court's opinion in a case where mandamus was conditionally granted by the supreme court, compelling a trial court to vacate its order authorizing extensive discovery from a non–party expert witness for impeachment purposes only. Russell v. Young, 452 S.W.2d 434, 435 (Tex. 1970) (orig. proceeding). The trial court in *Walker* interpreted the *Russell* case as an absolute bar from obtaining information for impeachment purposes only from non-party witnesses. *Walker*, 827 S.W.2d at 838. However, the supreme court noted that in *Russell*, the credibility of the non-party expert had not been put in question, and thus such broad discovery for impeachment purposes was improper. *Id.* The court noted that in *Walker* the relators were not seeking that type of global discovery that had been disapproved in *Russell*, but were seeking limited discovery for purposes of impeachment of a witness whose credibility had been put in issue. *Id.* Thus, the trial court's "erroneous interpretation of the law" constituted a clear abuse of discretion. *Id.* at 840.

> court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.[245]

Although finding the trial court abused its discretion, the court held that the relator had an adequate remedy by way of appeal and therefore denied the mandamus relief on this discovery dispute.[246] Following *Walker*, the court continued to apply its new abuse of discretion standard by conditionally issuing mandamus relief in those situations where the trial court had misapplied the law[247] or had resolved a factual issue in an arbitrary or unreasonable manner.[248]

245. *Walker*, 827 S.W.2d at 839–40 (citations omitted). The *Johnson* court had earlier said "to find an abuse of discretion [when factual matters are in dispute], the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter." Johnson v. Fourth Ct. of App., 700 S.W.2d 916, 918 (Tex. 1985), *disapproved of in In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding).

246. *Walker*, 827 S.W.2d at 844. The court noted that there were situations where a party would not have an adequate appellate remedy from an erroneous ruling by the trial court. *Id.* at 843. In the discovery context the court gave three different examples: (1) a trial court's erroneous order requiring the "disclosure of privileged information;" (2) a trial court's erroneous order that would prevent a party from presenting a viable claim or defense; and (3) a trial court's order denying discovery in those situations where the missing discovery would not be in the record, so that an appellate court could not ascertain if an error had occurred in not requiring the material to be produced. *Id.* at 843–44.

247. *See In re* Tex. Dep't of Trans., 218, S.W.3d 74, 76–79 (Tex. 2007) (holding that a trial court abused its discretion by not transferring a case to a county of mandatory venue when properly established); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (holding that the trial court abused its discretion in failing to enforce a valid contractual waiver of jury trial); *In re* AIU Ins. Co., 148 S.W.3d 109, 114 (Tex. 2004) (orig. proceeding) (stating that the trial court abused its discretion in failing to enforce a forum selection clause); *In re* Allstate Cnty. Mut. Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding) (declaring that the trial court abused its discretion by failing to "analyze or apply the law correctly"); *In re* Masonite Corp., 997 S.W.2d 194, 197–98 (Tex. 1999) (orig. proceeding) (finding that the trial court's transferring venue on its own motion to counties other than those established as counties of proper venue was a clear abuse of discretion); Jack. B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992) (orig. proceeding) (holding that the trial court had abused its discretion in failing to apply the Federal Arbitration Act to a deceptive trade practice case).

248. *See In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778, 780 (Tex. 2006) (orig. proceeding) (finding a clear abuse of discretion in the trial court's finding that employees had not received an

IV. *IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS, SUBSIDIARY, LP* AND ITS PROGENY

The *Columbia*[249] case opened a new chapter in the ever-expanding mandamus jurisprudence of the Texas Supreme Court.[250] The case involved a suit by the family of a person who died in a hospital two days after being admitted with kidney stones.[251] After a trial of over three weeks the jury returned a unanimous verdict for the defendants.[252] The plaintiffs filed a motion for judgment notwithstanding the verdict and in the alternative, a motion for new trial.[253] The trial court granted a take nothing judgment as to some defendants, but granted a new trial as to the remaining defendants.[254] The new trial order merely stated that it was granted "in the interests of justice and fairness."[255] The defendants then

acknowledgment form of Dillard's arbitration policy); *In re* Ford Motor Co., 998 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding) (determining upon factual review that the trial court abused its discretion in imposing discovering sanctions); Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 776 (Tex. 1995) (orig. proceeding) (finding no evidence supporting the trial court's assertion of either specific or general jurisdiction over a nonresident defendant), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, 1997 Tex. Gen. Laws 4936, 4937 (amended 2011) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2013)). *But see* Samlowski v. Wooten, 332 S.W.3d 404, 411 (2011) (noting that a reasonable error in judgment on a factual determination was not an abuse of discretion).

249. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding).

250. The dissent asserted that the "practical effect of its [the court's] decision will be more frequent appellate intervention and delay." *Id.* at 219 (O'Neil, J., dissenting) (expressing concern over the parameters for reviewing a trial court's given reasons). The majority opinion attempted to blunt the dissent's accusation in the following words:

> [W]e disagree with both Creech [the plaintiffs who had been granted the new trial] and the dissent that granting relief will expand the use of mandamus review. The standards we employ do not expand mandamus principles nor go beyond principles we have identified as justifying mandamus review. And, mandamus review remains discretionary, not of right.

Id. at 209. While what the court says about mandamus review remaining discretionary may ring true, the fact is that the standards employed in *Columbia* do in fact significantly expand mandamus principles far beyond what the court has previously identified as justifying mandamus review.

251. *See id.* at 206 (providing that the estate of the decedent and the surviving wife, on behalf of herself and her children, filed suit against the hospital and several of the its staff members).

252. *Id.*

253. *Id.* The motion for new trial asserted three separate grounds: "(1) the jury's answer to the negligence question was manifestly unjust and against the great weight and preponderance of the evidence, (2) the evidence conclusively established defendants' negligence, and (3) a new trial was warranted in the interests of justice and fairness." *Id.*

254. *Id.*

255. *Id.* It is interesting to note that both the supreme court and the courts of appeals have the ability to remand cases in the interest of justice. *See* TEX. R. APP. P. 43.3 (authorizing the court of appeals, when reversing, to enter the judgment the trial court should have rendered "except when a remand is necessary for further proceedings or the interest of justice require a remand for another

filed a petition for writ of mandamus, which the court of appeals denied.[256] The defendants then sought a writ of mandamus from the Texas Supreme Court to direct the trial court to specify the reasons for its granting of the new trial.[257] The petition asserted that the trial court abused its discretion in "not specifying any grounds for granting the partial new trial other than in the interest of justice and fairness."[258]

The supreme court's opinion began by stating the two requirements that generally must exist in order for mandamus to issue—a clear abuse of discretion or the violation of a legal duty and an inadequate remedy on appeal.[259] Then court observed that it has also used mandamus selectively to "correct clear errors in exceptional cases."[260] The court initially decided that mandamus review was justified in this case, as this was one of

trial"); *Id.* R. 60.3 ("When reversing the court of appeals' judgment, the [s]upreme [c]ourt may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate."). Recently in identifying when a remand in the interest of justice was appropriate the supreme court said:

> Generally, when no evidence supports a judgment, we render judgment against the party with the burden of proof. But we have remanded a case to the trial court when we have changed our precedent or when the applicable law has otherwise evolved between the time of trial and the disposition of the appeal.

Natural Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 162 (Tex. 2012) (internal citations omitted); *see also* Ford Motor Co. v Ledesma, 242 S.W.3d 32, 45 (Tex. 2007) (remanding in the interest of justice because the court altered the way in which a design defect case was to be submitted to the jury); Bulanek v. WesTTex 66 Pipeline Co., 209 S.W.3d 98, 100 (Tex. 2006) (per curiam) ("The most compelling case for such a remand is where we overrule existing precedents on which the losing party relied at trial." (quoting Westgate, Ltd. v. State, 843 S.W.2d 448, 455 (Tex. 1992))).

256. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 238 (Tex. App.—Dallas 2006, orig. proceeding) (mem. op.) (holding that the trial judge's reason for granting the new trial "was sufficient"), *mand. granted*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding). The defendants sought mandamus relief in the court of appeals complaining of the lack of reasoning for the trial court's action in granting the new trial. *Id.* at 238.

257. *Columbia*, 290 S.W.3d at 206 (requesting in the alternative to direct the trial court to enter a judgment on the verdict). After the matter had been argued before the supreme court, a new judge succeeded the judge who had entered the original new trial order, and so the proceeding in the supreme court was abated and the matter was remanded to the new judge for reconsideration of the granting of the new trial. *Id.* at 206. The new judge entered an order reaffirming the granting of the new trial without stating any reasons. *Id.* Subsequently, the case was reinstated on the Texas Supreme Court's active docket. *Id.*

258. *Id.* at 207 (internal quotation marks omitted) (asserting that the circumstances of this case were extraordinary and that the relators had no adequate remedy at law). The petition also alleged that the trial court abused its discretion in granting a partial new trial and in failing to enter judgment on the verdict. *Id.*

259. *Id.* at 207.

260. *Id.*

those exceptional cases[261]—"protection of the right to jury trial."[262] The

261. *Id.* at 209. The "exceptional circumstances" situation is a relatively new approach taken by the Texas Supreme Court to intervene and interfere with trial court's discretionary activities. In its inception it was used to dispense with the second prong for the granting of mandamus relief the inadequacy of a legal remedy. Thus, if the court found exceptional circumstances, the adequacy of the legal remedy was irrelevant. The exceptional circumstances concept was first announced in *Canadian Helicopters Ltd. v. Wittig*, where the court asserted by way of dictum that mandamus might lie in the case of truly extraordinary circumstances "where an appeal may be inadequate." Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308–09 (Tex. 1994) (orig. proceeding), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, 1997 Tex. Gen. Laws 4936, 4937 (amended 2011) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2013)). While not finding exceptional circumstances in *Wittig* where a special appearance was denied, this dictum has had a long and expanding life. Following *Wittig*, there were two special appearance cases where mandamus was granted upon a finding of exceptional circumstances. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) (holding that the inherent problems in mass tort cases created exceptional circumstances making an appeal from the denial of a special appearance inadequate), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, sec 1, 1997 Tex. Gen. Law 4936, 4937 (amended 2011) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2012)); Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 776 (Tex. 1995) (orig. proceeding) (noting that in a case of exceptional circumstances an inadequate remedy by appeal was presumed), *superseded by statute on other grounds*, Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, 1997 Tex. Gen. Laws 4936, 4937 (amended 2011) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2013)). The court expanded the exceptional circumstances concept beyond the special appearance. *See In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding) (finding that an improper trial court's order transferring venue was in this case an exceptional circumstance where appeal was an inadequate remedy); s*ee also In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 210–11 (Tex. 2004) (orig. proceeding) (noting that absent extraordinary circumstances, mandamus would not issue unless there was an inadequate appellate remedy).

262. *Van Waters*, 145 S.W.3d at 210–11 (citing *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)). The *Columbia* court was clearly wrong in relying upon the *Prudential* case on this point. *Prudential*, like all the cases that have applied the *Wittig* "exceptional circumstances" concept, have used it to avoid having to determine whether there was an inadequate remedy by appeal. In fact the *Prudential* court put it these words:

> The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in *exceptional cases* may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

court quickly concluded that relators had no adequate remedy by appeal.[263] In evaluating whether the trial court had abused its discretion, the court noted that while Texas trial courts have broad discretion in granting new trials, the rules of procedure[264] and the case law[265] imposed

In re Prudential Insurance Co. of America, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (emphasis added).

263. *Columbia*, 290 S.W.3d at 209–10. The court started its discussion of whether relator had an adequate remedy by appeal, by referring to the two recognized instances where mandamus relief was available—when a new trial was ordered during the trial court's plenary power where the order was void, or where it was granted based on an erroneous determination of irreconcilable jury answers. *Id.* Thus, the court concluded that absent the supreme court granting mandamus relief in this very case, the defendants would "seemingly have no appellate review of the orders granting new trial." *Id.* This was a true statement given the fact that, other than the brief period from 1925 to 1927 when there was statutory authority for interlocutory appeals from orders granting new trials, no Texas case had ever authorized an appeal from an order granting a new trial since Texas became a state in 1845. *See* Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 48–52 (2007) (noting the standard, during this period, for granting mandamus relief). Thus, in reality, the only way an order granting a new trial could be reviewed by an appellate court would be through a mandamus proceeding. However, this is the first time the supreme court inferred that the unavailability of mandamus relief might satisfy the second prong of the traditional test for granting mandamus relief on the inadequacy of an appeal. *See Columbia*, 290 S.W.3d at 215 (holding for mandamus relief on the inadequacy of appeal). Perhaps the court was inadvertently changing the rules for mandamus relief that had existed since Texas was a republic, or perhaps the court just mistakenly thought mandamus was a remedy by appeal. In either case, the comments by the court are truly disturbing. Then, the court returned to its analysis of the inadequacy of an actual appeal by stating that if on retrial the defendants obtained an unfavorable verdict, the possibilities of establishing error in the granting of new trial following the first trial were remote. *See Columbia*, 290 S.W.3d at 209–10. Even in the event that the unfavorable verdict was reversed, the defendants would have incurred more expense, lost time, and incurred more trouble. *Id.* at 210. Thus, the court held that the defendants did not have an adequate remedy by appeal. *Id.* However, as noted above, since the court determined this was a case of exceptional circumstances under *Wittig* and its progeny, the court had no reason to even broach the adequacy of the legal remedy by appeal.

264. *See Columbia*, 290 S.W.3d at 210 (citing TEX. R. CIV. P. 320, 321, 322, 326).

265. *See id.* at 208. Here the court cited only three cases to support its assertion that a trial court's discretion in granting new trials has limits. *Id.* at 210 (citing Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985); Larson v. Cactus Utility Co., 730 S.W.2d 640, 641–42 (Tex. 1987)). In the case establishing other limitations on the trial court's discretion in granting a new trial, the trial court overruled a defendant's motion for new trial, conditioned on the plaintiff's remitting a portion of the damages found in his favor, without giving any reasons for its actions. Larson v. Cactus Utility Co., 730 S.W.2d 640, 641–42 (Tex. 1987). On appeal, the court of appeals affirmed the trial court's judgment, noting that the trial court had not abused its discretion in ordering the remittitur. *Id.* at 642. Appeal was then taken to the supreme court. The supreme court held that a trial court should order a remittitur on the insufficiency of the evidence to support the jury's award, and not on an abuse of discretion standard. *Id.* The court then held that a court of appeals should uphold a trial court's remittitur only when the evidence was factually sufficient to support the trial court's decision. *Id.* Therefore, the court remanded the case back to the court of appeals to conduct a factual sufficiency review of the trial court's order of remittitur. *Id.* Far from being a limitation upon the trial court's ability to grant new trials, this case involved the proper standard of review for both a trial

limitations upon that discretion.[266] The court then gave the following examples of those limits: new trials may be granted to a party for sufficiency or weight of the evidence, when damages are "manifestly" too small or too large, and for "good cause."[267]

court and a court of appeals in cases of remittitur. A trial court, at the time of the *Larson* case and today, has the authority to suggest a remittitur as a condition for overruling the other party's motion for new trial, subject to having the remittitur reviewed on a factual sufficiency basis by the court of appeals. The trial court's order of remittitur must also be based on the factual sufficiency of the evidence to support the damage award. *Id.* at 641. However, if a party refuses the remittitur, a new trial will be ordered from which there is no appellate review. *Id.* at 642. So the *Larson* case, far from being a limitation of the trial court's discretion in granting new trials, imposes a limitation upon the denial of the motion for new trial tied to a remittitur. The denial of the motion for new trial and entry of judgment for an amount of damages less than that found by the jury can only be based upon a factual sufficiency determination that the damages found by the jury were excessive and some lesser amount is supported by factually sufficient evidence. If the successful party decides not to accept the remittitur, the new trial will be granted with no appellate review.

266. Cactus Util. Co. v. Larson, 709 S.W.2d 709, 717–18 (Tex. App.—Corpus Christi, 1986), *overruled in part by Larson*, 730 S.W.2d at 642.

267. *Columbia*, 290 S.W.3d at 208. This particular language was followed by a footnote. In that note, the court stated that although it was not going to define "good cause" in Rule 320, the rule did not authorize the granting of new trials for just any cause. *Id.* What the court fails to state, however, is that nothing in the rule requires that the good cause be stated, or that good cause be found for the granting of a new trial. *See* TEX. R. CIV. P. 320 (stating only that "[n]ew trials may be granted and judgment set aside for good cause"). This difference is important as the phrase "good cause" appears almost thirty times in the Texas Rules of Civil Procedure relating to the trial of a case. While some of the rules merely say that the court may take action for good cause, the majority of times the phrase is used it is combined with other important words, such as "for good cause shown" or "for good cause stated." In fact, a few rules actually require that the good cause be stated in writing or on the record. *See id.* R. 5(b) (stating that a court may permit an enlargement of time "where good cause is shown" in the motion); *Id.* R. 10 (stating that an attorney may withdraw from a case upon filing a written motion for "good cause shown"); *Id.* R. 13 (stating that sanctions under this rule may not be imposed "except for good cause the particulars of which must be stated in the sanction order"); *Id.* R. 18a (stating that following the filing of a motion to disqualify or recuse, a judge is not to take any further action in a case where there has been no evidence offered at trial "except for good cause stated in writing or on the record"); *Id.* R. 141 (stating for "good cause, to be stated on the record" the court may adjudge costs contrary to law or the rules); *Id.* R. 165a (stating that at the hearing set for dismissal for want of prosecution that the court shall dismiss the case "unless there is good cause for the case to be maintained on the docket"); *Id.* R. 171 (stating that the court may, "in exceptional cases, for good cause appoint a master in chancery"); *Id.* R. 191.1 (authorizing modifications of the discovery rules "by court order for good cause"); *Id.* R. 193.6 (stating that a party who fails to supplement or amend discovery responses or identify witnesses may not introduce the material or information or testimony of a witness except if the court "finds [that] there was good cause" for the failure); *Id.* R. 196.1(c)(2)(C) (noting that upon a "showing of good cause," a party may obtain the medical records of a nonparty without service of a request for production on the nonparty); *Id.* R. 196.6 (stating that "unless otherwise ordered by the court for good cause," the party producing documents pursuant to a request for production bears the expense of production); *Id.* R. 196.7 (stating that "only for good cause shown" will an order issue for entry on a nonparty's property); *Id.* R. 198.3(a) (allowing the withdrawal or amendment of an admission upon a showing of good cause); *Id.* R. 203.6(a) (stating that "for good cause shown," a court may require a party who wants to use a nonstenographic recording or a written transcription of it to obtain a transcription of the recording

The court did not attempt to define good cause, but merely said that a party's right to a trial by jury imposed restrictions on a trial court's discretion in "setting aside jury verdicts for less that specific, significant, and proper reasons."[268]

The court began the heart of its opinion attempting to justify its conclusion that a trial court must give reasons for setting aside a jury verdict; it initially stated that all appellate courts were required to give written opinions fully explaining their decisions.[269] The court then observed that a court of appeal's opinion reversing a trial court's judgment based on a jury's verdict on grounds that the verdict was not supported by factually sufficient evidence was required to detail the relevant evidence to support its decision.[270] Although recognizing the differences between the standards by which an appellate judge and a trial judge might set aside a jury verdict,[271] it concluded by asserting that irrespective of these

from a certified court reporter); *Id.* R. 204.1(c) (stating that the court may issue an order for mental or physical examination "only for good cause shown" and under certain circumstances); *Id.* R. 247 (noting that a case may be taken from the trial docket for the date set "for good cause upon motion"); *Id.* R. 253 (stating that the mere absence of council "is not good cause for a continuance" for a case called to trial); *Id.* R. 265 (stating that except for "good cause stated in the record," the normal order of proceedings of a jury trial will not be changed); *Id.* R. 320 (stating that judgments may be set aside or new trials granted for "good cause"); *Id.* R. 329 (stating that a new trial may be granted following a default judgment following service by publication upon a "showing good cause, supported by affidavit"); *Id.* R. 330(c) (noting that in certain district courts when a case is called for trial and only one party is ready, the court "may for good cause" continue the case or reset it); *Id.* R. 503.3 (noting that in justice courts the judge has the authority to postpone any trial "for good cause"); *Id.* R. 505.3(a), (b) (noting that the judge of the justice court can set aside a default judgment or dismissal "for good cause shown"); *Id.* R. 680 (noting that temporary restraining orders granted without notice will expire by their own terms unless "for good cause shown" are extended); *Id.* R. 684 (noting that where a temporary restraining order or temporary injunction is against the state or state or municipality, the bond may be set by the court in certain circumstances and upon entry of judgment on the bond, the court "for good cause shown by affidavit or otherwise" may render judgment for less than the full amount of the bond); *Id.* R. 792 (noting that in a trespass to try title lawsuit the court upon "good cause shown" may grant an extension of time to file the abstract); *Id.* R. 796 (noting that if a surveyor is appointed in a trespass to try title lawsuit, the report of the surveyor will be admitted as evidence unless it is rejected "for good cause shown").

268. *Columbia*, 290 S.W.3d at 211.

269. *Id.* ("We require appellate courts to explain by written opinion their analysis and conclusions as to the issues necessary for final disposition of an appeal."). The rules state that the court of appeals must always "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. The rules of appellate procedure also require that the supreme court hand down a written opinion. *Id.* R. 63. By way of contrast, nothing in the rules of civil procedure requires the trial court to state reasons for granting a new trial, much less give a written opinion for doing so.

270. *Columbia*, 290 S.W.3d at 211 (noting that the court of appeals "must detail all the relevant evidence and explain how it outweighs contrary evidence supporting the verdict or how the evidence is so against the great weight and preponderance of the evidence that it is manifestly unfair").

271. *Id.* (stating that trial judges were given more discretion than appellate courts in setting

differences, there was no significant dissimilarity in the results—"the prevailing party loses the jury verdict and the judgment, or potential judgment based on it."[272]

The court noted that the majority of states have statutes or procedural rules that require trial judges "in certain circumstances to specify reasons for setting aside jury verdicts."[273] The court then stated:

> We do not retreat from the position that trial courts have significant discretion in granting new trials. However, such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis. A trial court's actions in refusing to disclose the reasons it set aside or disregarded a jury verdict is no less arbitrary to the parties and public than if an appellate court did so. The trial court's action in failing to give its reasons for disregarding the jury verdict as to Columbia *was arbitrary and an abuse of discretion.*[274]

aside jury verdicts). These differences arose in part because appellate courts were bound to the matters presented to them by the parties by way of the record and had no firsthand knowledge of what went on during the trial. *Id.*

272. *Id.* at 207.

273. *Id.* at 212; *see also* FED. R. CIV. P. 59(d) (providing that when a court grants a new trial sua sponte, or based in reasons no listed in the motion, that it "must specify the reason in its order"). The dissent correctly points out the distinction between these jurisdictions and Texas in the following language:

> The [c]ourt 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* . . . . 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. In none of the remaining jurisdictions was the rule promulgated on mandamus or its equivalent, and for good reason.

Columbia, 290 S.W.3d at 217–18 (O'Neill, J., dissenting) (emphasis in original).

274. *Columbia*, 290 S.W.3d at 212–13 (emphasis added) (internal citations omitted). Once again the court played fast and loose with legal precedents. Both of the cases relied on by the court dealt with a specific rule of appellate procedure that requires a court of appeals in a case where the issues were settled to "write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.4. *In Gonzalez v. McAllen Medical Center, Inc.*, the supreme court held that a memorandum opinion merely advising the parties of the court's decision but failing to articulate any reason for that decision did not comply with the appellate rule. Gonzalez v. McAllen Med. Ctr., Inc., 195 S.W.3d 680, 681 (Tex. 2006). In *Citizens National Bank in Waxahachie v. Scott*, the court held that a memorandum opinion must contain the stated reasoning behind the appellate court's decision. Citizens Nat'l Bank in Waxahachie v. Scott, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam). One can see the arbitrary nature of an appellate court's specific refusal to comply with a rule that required a writing containing reasons for its decision. However, how that same characterization of arbitrariness and abuse of discretion can be cast on the trial court in this case where no rules, law, or legal precedent—until this decision—imposed any obligation on such court to give written reasons for its granting of a new trial. The court's holding is beyond the pale of judicial reasoning and smacks of arbitrary judicial intervention in the discretionary actions of the trial court to substitute its opinion of the issue for that of the trial court.

Not content with just imposing this new general requirement on trial courts, the supreme court then held that granting a new trial in the "interest of justice" was too vague and insufficient under the new test the court had just established.[275] Interspersed throughout the lengthy and sometimes rambling majority opinion were the true signs of its justifications for jettisoning the well-settled and established jurisprudence concerning the trial court's discretion in granting new trials and mandamus review of those decisions—complete and utter frustration with what it perceived to be the abuse of privilege by trial judges in granting new trials and the supreme court's utter inability to control those actions.[276]

275. *Columbia*, 290 S.W.3d at 213. The court stated:

> However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury. Parties and the public generally expect that a trial followed by a jury verdict will close the trial process. Those expectations may be overly optimistic, practically speaking, but the parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried. To the extent statements or holdings in our prior cases conflict with our decision today, we disapprove of them.

Id. Perhaps in response to the dissent's criticism of overturning well–established precedent the majority said simply: "We do not lightly alter a status established by our prior decisions. But when the status shields decisions affecting rights such as those relating to jury trials from the view of the parties and the public, we should not hesitate to reconsider it." *Id.* at 214. Irrespective of these pious words, the plain fact of the matter was that the court had once again interjected itself into incidental trial court decisions in order to extend its jurisdiction and to substitute its judgment and discretion for that of the trial court. While perhaps one might empathize with the court's apparent frustration with a trial judge's seemingly absolute discretion in granting new trials, judicial fiat is not the correct approach to remedy the issue. But apparently, that was the only approach, as the court rejected taking the rule-making approach to the alleged problem as suggested by the dissent. *Id.* at 214, 218. The reason given for rejecting a rule change was the court's opinion that the current status of the law at the time was the result of its own decisions. *Id.* at 214. However, this opinion is only partially correct. It is true that it was the Texas Supreme Court that had earlier held that the granting of a new trial in the interest of justice was not an abuse of discretion. Johnson v. Fourth Ct. of App., 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding), *disapproved of in Columbia*, 290 S.W.3d at 213. However, the two limited instances where the court had authorized mandamus relief in cases where a trial court granted new trials was a direct application of the statutes authorizing the supreme court to grant mandamus relief. As has been shown above, since statehood the supreme court has been authorized to compel a trial court to proceed to judgment. In the case of an erroneous determination of irreconcilable jury answers, mandamus relief was only an application of this statutory authority to compel the court to proceed to judgment as there was a valid and proper verdict. In the case of a void order granting a new trial, mandamus relief was once again a direct result of the court's statutory authority compelling enforcement of the previous judgment, as the court order setting it aside was a complete nullity leaving only the original judgment.

276. The amendments to the Texas Constitution in 1891 severely limited the appellate jurisdiction of the Texas Supreme Court. Tex. S.J. Res. 16, § 3, 22d Leg., R.S., 1891 Tex Gen. Laws

Justice O'Neill, joined by three of her colleagues, wrote a blistering dissent.[277] She flatly rejected the majority's recitation that there were exceptional circumstances in this case or that the trial court had so disregarded the guiding principles of law that the harm was irreparable.[278] She noted that the court's true justification for its ruling was one of policy—creating confidence in the legal system—and was not directly premised on the law.[279] However, she quickly dispatched this seemingly compelling policy argument by noting that the same argument could be

197, 197–98 (limiting the court's appellate jurisdiction to questions of law), *reprinted in* 10 H.P.N. GAMMEL, *The Laws Of Texas 1822–1897*, at 199–200 (Austin, Gammel Book Co. 1898). That same constitutional amendment made the decisions of the new court of civil appeals final on all questions of fact brought before them on appeal. *Id.* § 6, at 201 (limiting the court's appellate jurisdiction to questions of law). This limitation on the supreme court's jurisdiction was intentional. *See* Betts v. Johnson, 96 Tex. 360, 73 S.W. 4, 5 (1903) (orig. proceeding) (explaining that the purpose of the constitutional amendments was to limit the jurisdiction of the supreme court). The supreme court has struggled with these limitations and sought through both its appellate jurisdiction, and more commonly through its original mandamus jurisdiction, to reassert its presence in the decision-making of lower courts. In the area of its appellate jurisdiction, it has inserted itself into factual sufficiency review of trial court findings by holding that although it has no fact jurisdiction, it has jurisdiction to determine if the court of appeals applied the correct legal standard in reviewing trial court findings. *See* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988) (holding the court had jurisdiction to review court of appeal rulings on non–findings); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) (finding that the court had jurisdiction to determine if the court of appeals correctly applied the correct legal standard in reviewing factual sufficiency points of error); *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661–62 (Tex. 1951) (per curiam) (stating that the court might accept jurisdiction to determine if the court of civil appeals used the right legal standard in reviewing a factual sufficiency points of error). In the area of mandamus jurisprudence, because the legislature has placed restrictions on its exercise, the Texas Supreme Court has continually sought new situations where it can exercise its original mandamus jurisdiction to correct what it perceives to have been an erroneous decision by the trial court. *Columbia*, 290 S.W.3d at 213 (imposing a new requirement upon a trial courts to give reasons for disregarding a jury verdict); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (creating a new balancing test in mandamus relief to determine whether a relator has an adequate remedy by way of appeal); Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 683 (1956) (orig. proceeding) (creating a new area of mandamus relief in the case of an abuse of discretion).

277. *Columbia*, 290 S.W.3d at 215–22 (O'Neill, J., dissenting).

278. *See id.* at 215 (O'Neill, J., dissenting) (citation omitted) (noting that the trial court in this case had not disregarded legal principles but had merely followed well established legal principles in "grant[ing] a new trial 'in the interest of justice and fairness'").

279. *Id.* at 216 (O'Neill, J., dissenting) (stating that the motivating factor in the court's decision was to enhance "public confidence in the judicial system"). The majority basically admitted that the decision was motivated more by policy reasons than legal reasons in the following language:

> [W]e believe it important enough to the transparency of our judicial system and to its apparent fairness to the public that even if a trial judge on occasion gives specious reasons for setting aside a jury verdict, the balance still weighs heavily in favor of requiring trial courts to give their reasons for setting aside or disregarding verdicts.

Id. at 214 (O'Neill, J., dissenting).

used as a justification for reviewing almost any trial court's interlocutory rulings rendered without a given reason but, as she noted, no such review has yet occurred.[280] She next hinted at what was probably the true justification for the majority's opinion—the potential abuse of the privilege by trial courts in exercising their discretion in granting new trials.[281] Of course, she correctly pointed out that instead of abandoning established law, the court could have simply amended its own rules to require the stating of reasons in the order granting a new trial.[282]

She then turned her attention to the legal justification for the court's decision—initially, she asserted that the trial court had not disregarded the law in this case, but had in fact merely followed over twenty years of the court's own precedents in granting a new trial in the interest of justice.[283] Therefore, she boldly asserted that the trial court clearly did not abuse it discretion in this case.[284] She then dispatched two other legal arguments that the majority used to justify overruling established law.[285] First, she forcibly rejected the existence of exceptional circumstances in this case by noting that the court had already held that the right to jury trial was not

280. *Id.* at 216 (O'Neill, J., dissenting).

281. *See id.* (O'Neill, J., dissenting) (stating that the majority "purports to justify its misadventure on the principle that trial courts may not substitute their judgment for that of the jury").

282. *See id.* (suggesting Texas Rule of Civil Procedure 320 could have been amended to require a court to specify its reasons for granting a new trial).

283. *Id.* at 218 (O'Neill, J., dissenting). The dissent put it in these words: "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 . . . ." *Id.* (O'Neill, J., dissenting). Justice O'Neill bluntly stated that that the court "simply changes the rule and jettisons the law upon which the trial court relied." *Id.* at 215 (O'Neill, J., dissenting). Perhaps more significant, was the prediction that she saw "no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory rulings." *Id.* at 215–16 (O'Neill, J., dissenting). She suggested that if the court was concerned about abuses in the broad discretion granted to trial courts to grant new trials, that a simple solution would be to amend the rules to require the trial court to "specify the reasons in its order." *Id.* at 216. She noted that most states and federal courts enacted rules implementing a requirement that trial courts must state reasons for granting new trials, and she observed that the legislature was fully aware that trial courts had been given the power to grant new trials in the interest of justice, but while permitting interlocutory review of new trial orders in criminal matters, has failed to enact such a change in civil cases. *Id.* (O'Neill, J., dissenting).

284. *Id.* at 218 (O'Neill, J., dissenting) (noting that a clear abuse of discretion entails a failure to apply the law correctly).

285. *See id.* (O'Neill, J., dissenting) (noting first that warranting mandamus requires an abuse of discretion and second, the legislature knows of a trial court's authority to grant new trials in the interest of justice and fairness).

constitutionally infringed upon by the granting of a new trial.[286] Then she identified those instances where the court overturned its own precedent based on compelling circumstances, and clearly established that none of those circumstances existed in the *Columbia* case.[287]

She then turned to the practical ramifications of the case. It was here that she decried the "micromanagement of the trial process"[288] that was introduced by the court's decision and the "fruitless expense and delay"[289] that would be caused by the court's opinion.[290] She also expressed concern about what the decision would mean for trial courts as well as appellate courts in the following language: "[I]t is not clear how extended the trial court's explanation for a new trial would have to be, nor is it clear what a reviewing court should do with that information."[291]

286. *Id.* at 221 (O'Neill, J., dissenting). Given the fact that the only exceptional circumstance given by the majority was the protection of the right to a jury trial, Justice O'Neill addressed that concern simply by noting:

> 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. . . . 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. 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. 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. 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.

Id. at 221–22 (O'Neill, J., dissenting) (citations omitted) (internal quotation marks omitted). One must assume that even the dissenting justices have permitted the *Wittig* exceptional circumstances concept to become a basis for mandamus review, as opposed to being the basis for eliminating the requirement that there is an inadequate remedy by appeal.

287. *See In re* Columbia Med. Ctr. of Las Colinas Subsidiary, LP*,* 290 S.W.3d 204, 218 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting) (noting that the court had found compelling reasons for overruling precedent).

288. *See id.* at 220 (O'Neill, J., dissenting) (noting that the trial court was in a better position that an appellate court in determining whether the parties received a fair trial).

289. *Id.* (O'Neill, J., dissenting).

290. *Id.* (O'Neill, J., dissenting).

291. *Id.* at 219 (O'Neill, J., dissenting) (noting that the parameters for reviewing the trial court's explanation are murky at best). She gives the following examples:

> 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." Will a judge's statement that a new trial is ordered "because of insufficiency or weight of the evidence" satisfy the court's requirement? Or must the trial judge, like an appellate court, review the entire record and

In conclusion, Justice O'Neill stated that the case did not establish those needed exceptional circumstances or compelling reasons to justify changing "clear and longstanding precedents on mandamus review."[292]

Justice O'Neill's opinion pointed out the fundamental flaw in the majority's opinion—there was simply no abuse of discretion in the *Columbia* case.[293] The trial court had followed existing Texas Supreme Court precedents in granting the motion for new trial in the interest of justice.[294] It was the supreme court itself that failed to adhere to existing legal precedents for evaluating whether the granting of a new trial in this case could be characterized as an abuse of discretion.[295] There was no arbitrary or unreasonable action by the trial court, nor did the trial court commit a clear and prejudicial error of law.[296] Never before had the Texas Supreme Court held that a trial court clearly abused its discretion by merely following existing well-established law.[297] Apparently, the supreme court, while frustrated that a trial judge might substitute "his or

> 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?" 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?

Id. at 219–20 (O'Neill, J., dissenting) (internal citations omitted) (noting that this decision could lead to an interlocutory evidentiary review that has in the past be afforded only on appeal from a final judgment).

292. *Id.* at 222 (O'Neill, J., dissenting).

293. *See id.* at 215 (O'Neill, J., dissenting) ("[T]his case presents neither exceptional circumstances nor a departure from controlling law, as the trial court followed one of our most well-established legal principles.").

294. *See id.* at 218 (O'Neill, J., dissenting) ("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.").

295. *See id.* at 217 (O'Neill, J., dissenting) ("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 both. For this alone we should deny mandamus relief.").

296. *See id.* at 218 (O'Neill, J., dissenting) (emphasizing that the trial court's action did not warrant mandamus relief).

297. *See In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 217 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting) (asserting that the granting of mandamus after the trial court had followed precedent would in effect "create new law on mandamus").

her own views for that of the jury without a valid basis,"[298] found nothing wrong with substituting its own discretion for that of the trial court.[299]

Since the *Columbia* decision the court has conditionally granted petitions for writ of mandamus in a series of cases directing trial courts to specify the reasons for their granting of new trials.[300] However, it has only been in two cases where the court has addressed some of the lingering questions unanswered in the *Columbia* decision.[301] In *In re United Scaffolding, Inc.*,[302] the plaintiffs brought suit to recover for injuries sustained by one of the plaintiffs after falling from a the scaffolding built by the defendant.[303] Following the trial of the case, the jury returned a verdict in favor of the plaintiffs, and the court entered a judgment based on the verdict.[304] Apparently unhappy with the verdict and resulting judgment,[305] the plaintiffs filed a motion for new trial,[306] which was granted by the court "in the interest of justice and fairness."[307] In light of the *Columbia*

298. *Id.* at 212 (O'Neill, J., dissenting).

299. *See id.* at 216 (O'Neill, J., dissenting) (criticizing that "it is equally true that an appellate court may not substitute its discretion for that of the trial court").

300. *See In re* Cook, 356 S.W.3d 493, 495–96 (Tex. 2011) (orig. proceeding) (per curiam) (conditionally granting mandamus to compel a successor judge to specify reasons for not entering judgment on the verdict); *In re* United Scaffolding, Inc., 301 S.W.3d 661, 663 (Tex. 2010) (orig. proceeding) (per curiam) (conditionally granting a mandamus to compel a trial court to specify the reasons for the granting of a new trial); *In re* Baylor Med. Ctr. at Garland, 289 S.W.3d 859, 861 (Tex. 2009) (orig. proceeding) (holding that a trial court abused its discretion by refusing to enter judgment on a verdict and in granting a new trial without specifying the reasons); *In re* E.I. du Pont de Nemours and Co., 289 S.W.3d 861, 862 (Tex. 2009) (orig. proceeding) (granting mandamus to compel the trial court to specify reasons for disregarding the jury verdict). The *Cook* and *Baylor* cases dealt with the court compelling successor judges to specify their own statement of the reasons for setting aside the jury verdict. *See Cook*, 356 S.W.3d at 495 (noting that the former trial judge's reasons in the order were not in issue, as the focus was "on whether the most recent order by the successor judge satisfies *Columbia*"); *Baylor*, 289 S.W.3d at 860 (observing that the court did not consider the reasons why the former judge granted a "new trial in determining whether a successor judge abused his or her discretion in refusing to enter judgment on the verdict"). The *DuPont* case simply involved compelling the actual trial judge to specify the reasons for granting a new trial. *In re* E.I. du Pont de Nemours and Co., 289 S.W.3d 861, 861 (Tex. 2009) (orig. proceeding).

301. *See, e.g.*, *Columbia,* 290 S.W.3d at 219 (O'Neill, J., dissenting) ("[I]t is not clear how extended the trial court's explanation for a new trial in similar situations would have to be, nor is it clear what a reviewing court should do with that information.")

302. *In re* United Scaffolding, Inc., 301 S.W.3d 661 (Tex. 2010) (orig. proceeding) (per curiam).

303. *Id.* at 662.

304. *Id.*

305. *Id.* at 686 (stating that the jury awarded no recovery for past damages and found the defendant only to have been 51% responsible for the injuries sustained by the plaintiffs).

306. *Id.* at 662 (containing three separate grounds for a new trial, including that the damages "were manifestly too small" and that the "trial court should grant a new trial in the interest of fairness and justice").

307. *Id.*

decision, a conditional mandamus was issued at the request of the defendant from the Texas Supreme Court,[308] directing the trial court to "specify its reasons for disregarding the jury verdict and ordering a new trial."[309] Pursuant to the court's mandate, the trial court rendered an amended order adding three additional reasons for the granting of the new trial.[310] Once again the defendant sought mandamus relief asserting in part that the amended order still failed the specificity test of *Columbia*.[311] Prior to examining the specific reasons given by the trial judge, the court considered "how detailed a trial court's new-trial order must be, as well as what level of review it is subject to."[312] In determining which standard of review to apply to the reasons given by the trial court for the new trial, the court concluded that the standard that the courts of appeals were required to follow when reviewing factual insufficiency complaints was inappropriate for reviewing the granting of new trials.[313] However, it

308. *Id.* at 663. The defendant had initially sought to have the court of appeals issue a mandamus, but that court denied the requested relief. *In re* United Scaffolding, Inc., 287 S.W.3d 274, 275 (Tex. App.—Beaumont 2009, orig. proceeding), *mand. granted*, 301 S.W.3d 661 (Tex. 2010) (per curiam).

309. *United Scaffolding*, 301 S.W.3d at 663. Both the trial court and the court of appeals decisions were rendered prior to the *Columbia* case. *Id.* at 662. As a result, the plaintiffs asserted that the trial court could not have abused its discretion because it did not disregard or violate any legal authority at the time of his action. *Id.* at 663. The supreme court dismissed that argument, stating that "an erroneous legal conclusion is an abuse of discretion, even if it may not have been clearly erroneous when made." *Id.*

310. *Id.* at 686–87. The court's order stated that it was granting a new trial for the following reasons:

> A.The jury's answer to question number three (3) is against the great weight and preponderance of the evidence; *and/or*
> B. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant was a proximate cause of injury in the past to Plaintiff, James Levine; *and/or*
> C. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant supports an award of past damages; *and/or*
> D. In the interest of justice and fairness.

Id. at 687 (emphasis in original).

311. *Id.* at 687. The defendant had first sought mandamus relief from the court of appeals that was denied. *In re* United Scaffolding, Inc., 315 S.W.3d 246, 251 (Tex. App.—Beaumont, 2010, orig. proceeding), *mand. granted*, 377 S.W.3d 685 (Tex. 2012). In the court of appeals, the defendant also argued that *Columbia* required that the reasons be supported with references to evidence. *Id.* at 249.

312. *See United Scaffolding*, 377 S.W.3d at 687 (noting that in considering these issues, the court needed to balance the regard for the jury verdict with the respect of the trial court's discretion).

313. *See id.* (noting that relator urged the use the same type of factual sufficiency review of the reasons as required of courts of appeals). In rejecting the *Pool* standard, the court noted that such a standard would greatly infringe upon the trial court's discretion and would in all likelihood be impossible for a trial judge to satisfy. *Id.* at 687–88 (finding that the trial judge would not have the written record from which to obtain a detailed statement of the presented evidence). In *Pool*, the

gave no further direction as to the appropriate standard of review; apparently, because the reasons given in the amended order granting new trial did not satisfy the new two-part test the court established in this case.[314] Noting that *Columbia* did not focus on the length or detail of the reasons, but was more concerned that the verdict was set aside only after careful thought and for valid reasons,[315] the court presented its two-pronged criteria for evaluating a trial court's reasons for granting a new trial:

> [W]e hold that 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 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.[316]

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court held that when courts of appeals were reversing cases on factually insufficiency grounds they were required to:

> [D]etail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; . . . or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.

Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In *United Scaffolding*, the supreme court felt that the differences between a trial judge who was present and a participant in the entire trial, and a appellate court panel that would only have a cold record, militated against "requiring Pool-level detail." *United Scaffolding*, 377 S.W.3d at 688. Furthermore, the court noted that the rationale for the *Pool* standard to ensure that the appellate court considered the entire record before making a factual insufficiency determination was not as "potent" for the trial judge who had been present during the whole proceeding. *Id.* (holding that the *Pool* standards were "not appropriate for trial court orders granting motions for new trial").

314. The court specifically stated that it was not necessary to evaluate the "substantive basis for the amended order" as the amended order "(still) plainly violates our holding" in *Columbia*. *United Scaffolding*, 377 S.W.3d at 689.

315. *Id.* While rejecting the *Pool* standard, the court did not fully explain what was required in the trial court's order granting a new trial. The best that can be gleaned from the opinion was stated as follows:

> A trial court need not provide a detailed catalog of the evidence to ensure that, however subject to differences of opinion its reasoning may be, it was not a mere substitution of the trial court's judgment for the jury's. 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. Furthermore, in most cases a new trial will be granted for reasons stated in a motion for new trial, so that such an explanation will alert the parties to the reason the judge found persuasive, further illuminating the substantive basis for the order.

Id. at 688.

316. *Id.* at 688–89. By way of dictum, the court gave several examples of reasons for granting a

Applying this two-part standard, the court determined that the amended order granting a new trial violated the first prong in that each of the four reasons given in the amended order were preceded or followed by the phase "and/or," leaving the possibility that the sole reason for the granting the new trial was "in the interest of justice and fairness"—which was held to be insufficient in *Columbia*.[317] Therefore, mandamus was once more conditionally granted and the trial court was ordered once again to issue a new order that resolved the ambiguity caused by the "and/or" and "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."[318]

As a result of the court's determination in *United Scaffolding* that the amended order violated the court's previous holding in *Columbia*,[319] it was not necessary for the court to consider the relator's challenge to the substantive basis for the amended order and the related questions of "how in-depth the appellate review of orders granting new trials should be."[320]

new trial that would constitute a clear abuse of discretion including, giving a legally invalid reason, if the reason clearly states the trial court was merely substituting its judgment for that of the jury, of showed that you merely disliked a particular lawyer, or for invidious discrimination. *Id.* Furthermore, the court noted that generally giving as a reason "a mere recitation of a legal standard, such as a finding is against the great weight and preponderance of the evidence" would not suffice. *Id.* at 689. In this regard, the court noted: "That 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.* (suggesting that it would be an abuse of discretion if the order were a mere "pro forma template rather than the trial court's analysis").

317. *Id.* at 689–90. The court noted that it did not address the viability of the other three reasons. *Id.* at 690 n.3.

318. *Id.* at 690. This requirement of detailing the evidence was rather ironic given that the court had noted that a *Pool*-like detail was not required as "a trial judge does not have a record from which to draw detailed recitations of the evidence produced." *Id.* at 688. However, Justice Wainwright rejected the trial court's presumed lack of a trial record as limiting the scope of the sufficiency review of the trial court's granting a new trial. *Id.* at 691 (Wainwright, J., concurring) (noting the availability of real-time electronic transcripts). Justice Wainwright argued that trial judges have access to all trial records needed to formulate "valid, well-reasoned bases for granting motions for new trial that overturn jury verdicts." *Id.* (Wainwright, J., concurring). This of course brings back Justice O'Neill's concern in the *Columbia* case of "fruitless expense and delay" as parties go to the time and expense of getting a record and preparing detailed orders. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 220 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting).

319. *United Scaffolding*, 377 S.W.3d at 689–90 (stating that the order's language—"and/or"—gave rise to the possibility that the sole reason for the granting of the new trial was "in the interest of justice and fairness," which was rejected as not being "sufficiently specific").

320. *Id.* at 691 (Wainwright, J., concurring) (observing that the court had granted in the same day a petition for writ of mandamus in the case of *In re Toyota Motor Sales, U.S.A.*, "that squarely raises the issue of the nature and breadth of the substantive appellate review of orders granting motions for new trial").

The standard of review issue was finally addressed by the court in *In re Toyota Motor Sales, U.S.A., Inc.*[321] In *Toyota*, the estate of Richard King and his surviving family members filed suit against the defendants to recover for the decedent's death caused in a rollover accident.[322] The plaintiffs alleged that the decedent's 1997 Toyota 4 Runner contained a defective seat belt system, which allowed the decedent to be ejected when the vehicle rolled over.[323] Following a jury trial, the jury returned a verdict for defendants finding that there was no design defect in the safety restraint system, and a judgment was entered on the verdict in favor of defendants.[324] Plaintiffs filed a motion for new trial, alleging that "Toyota's counsel had violated the trial court's limine rulings by reading during closing argument" a redacted portion of the deposition of the investigating officer.[325] The trial court granted the new trial in a lengthy order giving reasons for its decision to grant a new trial.[326] The

321. *In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746 (Tex. 2013) (orig. proceeding). The supreme court put the issue in these words:

> We must decide whether, on mandamus review, an appellate court may evaluate the merits of a new trial order that states a clear, legally appropriate, and reasonably specific reason for granting a new trial. Stated differently, if a trial court's order facially comports with *Columbia* and *United Scaffolding*, may an appellate court review the correctness of the stated reasons for granting a new trial?

Id. at 757.

322. *In re* Toyota Motor Sales, U.S.A., Inc., 327 S.W.3d 302, 303 (Tex. App.—El Paso 2010, orig. proceeding), *mand. granted*, 407 S.W.3d 746 (Tex. 2013).

323. *Id.*

324. *Id.*

325. *Toyota*, 407 S.W.3d at 754.

326. The order stated as follows:

> On this day, the Court considered the Plaintiff's Motion for New Trial, Defendant's Response, Plaintiff's Amended Motion for New Trial, the law, and the record. After considering same and pursuant to this Court's authority under Rule 320 of the Texas Rules of Civil Procedure, the Court now hereby grants a new trial in the above–styled cause in the interest of justice because Defendant willfully disregarded, brazenly and intentionally violated the Court's orders in limine, evidentiary rulings, instructions and orders concerning a crucial evidentiary issue relating to seat belt use by Mr. Richard King, the decedent, during Defendant's closing argument, it purported to present evidence outside the record, and commented on matters in violation of the Court's order in limine. Specifically, during closing argument, Defendant read from the Deposition of witness Justin Coon concerning his lay opinion, and conclusion that Mr. King was not wearing a seat belt at the time of the commencement of the rollover. The Court had previously excluded these lay opinions and conclusory remarks by witness Coon on the grounds that they were not based on his personal knowledge and were, therefore, conclusory and incompetent to be presented to the jury and because witness Coon did not have the requisite training, education, schooling, or experience to opine whether or not Mr. King had been belted at the start of the rollover. This Court, mindful of its obligations under new Texas Supreme Court authority. . . has undertaken the review which only this court can take—which is different than that of an

defendants initially sought mandamus relief from the court of appeals; alleging, in part, that the reasons given for granting the new trial were "legally and factually insupportable."[327] The questions raised by the defendants in that mandamus proceeding were: first, whether the reasons given for the granting of the new trial satisfied the specificity requirement of *Columbia*, and if so, whether that was the end of the inquiry, or whether there was to be some further review of the merits of the grounds specified.[328] The court of appeals held that there was no question that the specificity requirement of *Columbia* was satisfied as the trial court had given the reasons for granting the new trial.[329] The court of appeals, however, was of the opinion that if the order satisfied the specificity requirements of *Columbia*, the *Columbia* case did not authorize a review of the merits of the grounds stated in the order granting a new trial.[330]

The plaintiff then sought mandamus relief from the Texas Supreme Court.[331] The supreme court asserted that as an order not satisfying the requirements of *Columbia* and *United Scaffolding* would be subject to correction by mandamus,[332] "it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot be evaluated"[333] by what the court called a merits-based review.[334] The

appellate court "who have only the record to consider"—and having seen the parties, and witnesses and sensed the affect of the above occurrence on the trial grants the motion for new trial, for the specific grounds set out herein, in the interest of justice.

Toyota Motor Sales, 327 S.W.3d at 304. The court also gave a second ground for the granting of the new trial: as a sanction for the Defendant's counsel reading from the deposition of the officer during closing argument, therefore interjecting "an inadmissible, factually unsubstantiated conclusion and lay opinion [] so prejudicial to the Plaintiffs and inflammatory that an instruction to disregard at such a late state in the trial could not eliminate its harm." *Id.*

327. *Id.* at 304–05.

328. Toyota argued that the language in *Columbia*, requiring the order granting a new trial to have proper reasons and a valid basis, established the supreme court's intent that a review of the merits stated in the order could be reviewed on mandamus. *Id.* at 306. However, the court of appeals noted that *Columbia* recognized the broad discretion that a trial court had in ordering new trials as well as reaffirming the trial court's "role of arbiter." *Id.* at 305–06. The court of appeals further noted that while the *Columbia* court did not attempt to define the good cause required by Texas Rule of Civil Procedure 320, noting the significance of the right to trial by jury, it recognized that a court setting aside a jury verdict must have specific, significant, and proper reasons for granting a new trial. *Id.* at 305.

329. *Id.*

330. *See id.* at 306 (finding that the order "serve[d] the goal of judicial transparency" and "bolster[ed] the perception that this jury verdict was not set aside lightly").

331. *Toyota*, 407 S.W.3d at 746.

332. *Id.* at 757–58 (citations omitted).

333. *Id.* at 758 (emphasis added) (noting that "[t]ransparency without accountability is meaningless"). Justice Wainwright mentioned this same proposition in his concurring opinion in *United Scaffolding*. *In re* United Scaffolding, Inc., 377 S.W.3d 685, 693 (Tex. 2012) (orig. proceeding)

stated purpose of a merits-based review[335] of a trial court's granting of a new trial was to prevent a trial court from setting "aside a verdict for reasons that are unsupported by the law or the evidence," even though the reasons given were facially valid.[336] It is clear from *Toyota* that this merits-based review entails an appellate court making a determination from the underlying record[337] that the reasons given by the trial court in granting a new trial are legally or factual supported.[338] While apparently the determination in the *Toyota* was straightforward[339] and cut and dry,[340] the

(Wainwright, J., concurring) (stating that "[a] rule that cannot be enforced is, in reality, no rule at all"). It is interesting to observe the progression of the expanding Texas Supreme Court's mandamus jurisprudence over a trial court's granting of new trials. First, in *Columbia* the court jettisoned over a century of legal precedent concerning the trial court's discretion in granting new trials, and created a new requirement that the trial court specify the reasons for granting a new trial. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 212–13 (Tex. 2009) (orig. proceeding). Then, having determined that reasons had to be given in the order granting a new trial, in *United Scaffolding* the court held that those reasons had to be legally appropriate and specifically related to the facts and circumstances of the case. *United Scaffolding*, 377 S.W.3d at 689. Then, in *Toyota*, the court noted that *now*, as it had required trial courts in granting new trials to state specific reasons supported by the facts and circumstances of the case, it needed to further expand its mandamus jurisdiction to evaluate the substantive basis of the required reasons. *Toyota*, 407 S.W.3d at 759. The court itself noted that the *Toyota* case "represents the next step in" the progression of limiting a trial court's discretion in granting new trials. *Id.* at 756–57 (noting that the trial court's discretion in granting new trials "was not limitless").

334. *Toyota*, 407 S.W.3d at 758. The term "merits-based review" was first mentioned by the supreme court in the concurring opinion of Justice Wainwright in *United Scaffolding*. *United Scaffolding*, 377 S.W.3d at 693 (Wainwright, J., concurring) ("[W]ithout a true merits[-]based review of the reasons given for granting new trials, *Columbia* will not be fully effective").

335. It is generally recognized in Texas that there are three major standards of review of trial court decisions: de novo, sufficiency of the evidence, and abuse of discretion. *See generally* W. Wendell Hall, O. Rey Rodriguez, Rosemarie Kanusky, & Mark Emery, *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 14 (2010). The review conducted by the court in this case fits into none of these known standards of review. In fact, nowhere in this lengthy law review article is there any reference to this standard of review. However, it is clear from the *Toyota* case, that if as a result of this new record-bound, merits-based review an appellate court determines that in its opinion the stated reasons for the granting of a new trial are not legally or factually supported, then the granting of the new trial was an abuse of discretion. *Toyota*, 407 S.W.3d at 762 (stating that the court's merits-based review "compels us to conclude that the trial court abused its discretion in granting a new trial here").

336. *See Toyota*, 407 S.W.3d at 758 (delineating that the underlying record must support the stated reasons for the granting of the new trial or the order cannot stand).

337. *Id.*

338. *Id.* at 757–58 (establishing that an appellate court may review the reasons a trial court grants a new trial against the law and evidence).

339. *Id.* (finding that in this case the determination of whether there was an abuse of discretion in granting a new trial was "relatively straightforward").

340. *Id.* at 764 (Lehrmann, J., concurring) (arguing that rarely will the review "be as cut–and–dry as confirming that evidence or testimony referenced during a closing argument is or is not in the record").

court still undertook a "cumbersome review of a multi-volume trial record"[341] and concluded that the "record does not support the new trial order."[342]

In order to justify its further expansion into the discretionary decision making of the trial courts, the court characterized the only two previous instances where mandamus had issued to compel a trial court to set aside a new trial order as merit-based review—"when a trial court's order was void or when the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict."[343] The court then stated that *Toyota* was analogous to those two instances of prior merits-based review,[344] and thus, perfunctorily concluded that appellate courts "must

341. *Id.* at 760.

342. *Id.* at 764.

343. *Id.* at 758 (citations omitted).

344. Notwithstanding the court's pronouncement, the dissimilarities between the two instances and the *Toyota* case far overshadow the similarities. In each situation the trial court granted a new trial following the return of a jury verdict and mandamus relief was sought alleging an abuse of discretion. Yet the similarities basically end there. In *Toyota*, the trial court granted a new trial on the basis of its determination that a lawyer had violated a limine order during his closing argument and as a sanction for doing so. *Id.* at 761. In order to determine whether the limine order had in fact been violated during the closing argument, the Supreme Court engaged in a "cumbersome review" of a "multi–volume trial record." *Id.* at 760. In effect, the court was required to review what occurred *during the trial of the case* and make a *factual* determination of whether the record supported the stated reason in the order granting the new trial. As Justice Lehrmann said in her concurring opinion, the court merely "confirm[ed] that evidence or testimony referenced during a closing argument is or is not in the record." *Id.* at 764 (Lehrmann, J., concurring). Because the stated reasons for granting the new trial were not supported by the record, the trial court abused its discretion in granting the new trial. In each of the two instances, the determination of whether the new trial should have been granted was a legal question, and not factually specific. In neither case was a "cumbersome review" of a "multi-volume trial record" necessary or undertaken. In the case of an order granting a new trial that is alleged to be void, the appellate court merely determines whether the trial court acted within its plenary power or jurisdictional power, and a "cumbersome review" of the record is unnecessary and never undertaken. If the order granting a new trial is outside the trial court's plenary power, or if the trial court had no jurisdiction to act, the appellate court holds as a matter of law that the order is void and of no effect. Clearly, in such a situation the appellate court is not reviewing the *merits* of the underlying motion for new trial because they are irrelevant to the determination of whether the order is void. Of course, if the order is void, the trial court abused its discretion in ordering the new trial. *In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding). While the merits of a motion granting a new trial on grounds of irreconcilable conflict are the focus of mandamus review of such order, unlike *Toyota*, the appellate court conducts a *de novo* review because the determination of whether a new trial should have been granted involves a legal question. *See, e.g.*, Bender v. S. Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980) (noting that the court's "inquiry is limited to the question of conflict, and our review of the jury findings is limited to a consideration of the factors before the jury"). *See generally* W. Wendell Hall, O. Rey Rodriguez, Rosemarie Kanusky, & Mark Emery, *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 192 (2010) (noting that as the question of whether there is an irreconcilable conflict in jury findings "is purely a legal question," mandamus is available to challenge a granting of a new trial on that basis). In the case of an alleged conflict, the

be able to conduct merits-based review of new trial orders."[345] Then by way of showing that Texas would not be the first, nor the only court, to conduct a merits-based review of a trial court's granting of a new trial, the court stated that federal appellate courts routinely "conduct record-bound, merits-based review of new trial orders to evaluate their validity."[346] It then briefly discussed two appellate decisions from the United States Court of Appeals for the Fifth Circuit that had used a merits-based review of a new trial order.[347] The court then conducted its own record-based,

court's review is limited to the questions, instruction, and definitions given by the trial court and its determination is as a matter of law. No "cumbersome review" of the record is necessary, nor undertaken. The court's focus is not on whether the trial court abused its discretion, but on whether there is a conflict in jury answers, and whether the conflict, if any, is fatal. *See, e.g.*, Arvizu v. Estate of Puckett, 364 S.W.3d 273, 276 (Tex. 2012) (per curiam) (stating that any conflict must be fatal to the entry of judgment such "that one of the conflicting findings 'necessarily requires the entry of a judgment different from that which the court has entered"' (citing Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 222 S.W.2d 985, 991 (1949))).

345. *Toyota*, 407 S.W.3d at 758. No reason was given why the "court[] must be able to conduct merits-based review." One must assume that it must be because it had allegedly done so in two other instances, and otherwise the rule announced in *Columbia* would be "no rule at all." *In re* United Scaffolding, Inc., 377 S.W.3d 685, 693 (Tex. 2012) (orig. proceeding) (Wainwright, J., concurring).

346. *In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746, 758 (Tex. 2013) (orig. proceeding).

347. *Id.* at 758–59 (citing Peterson v. Wilson, 141 F.3d 573 (5th Cir. 1998); Cruthirds v. RCI, Inc., 624 F.2d 632 (5th Cir. 1980)). The court acknowledged the argument of Toyota's counsel that although review of a new trial order on appeal following the retrial of the case was generally contrary to Texas precedent, there were federal cases in which the court of appeals had granted mandamus review of the new trial order before a retrial. *Id.* at 759 n.10. While such generalization by Toyota's counsel is true in the sense that a party may file for mandamus relief from a federal trial court's granting of a new trial, the United States Supreme Court has made it clear that such relief is rarely available. The United States Supreme Court stated its position very succinctly:

> Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this [mandamus] extraordinary remedy. . . . To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale . . . [that] any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. . . obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

Allied Chem. Corp. v. Daiflon, 449 U.S. 33, 35, 36 (1980) (citations omitted). Both cases discussed by the court involved appeals—not mandamus—following the retrial of the cases. The *Toyota* court's discussion of *Peterson v. Wilson* is extremely misleading and significantly wrong. *Toyota*, 407 S.W.3d at 758–59. The supreme court incorrectly stated that the trial court had granted the defendant's motion. The opinion states twice that the new trial was ordered sua sponte for reasons other than those stated in the defendant's motion. *Id.* at 758–59 (noting that the reasons given by the court in ordering a new trial differed from those in the motion and stating that the new trial was granted sua sponte and not on the basis of the motion). The order granting the new trial in *Peterson* stated that "based on the jury's verdict and comments the jurors made to the court after the verdict," the jury had disregarded the Court's instructions and a new trial was granted in the interest of justice. Peterson v. Wilson, 141 F.3d 573, 575 (5th Cir. 1998). The Fifth Circuit held that the trial court abused its discretion in granting a new trial based upon information the trial court obtained when it

merits-based review,[348] and it held that the trial court had abused its discretion because the record at the trial court did not "support the articulated reason"[349]—"that Toyota's counsel 'willfully disregarded, brazenly and intentionally violated' the limine order in closing."[350] In

met with the jurors ex parte and post verdict in direct violation of Federal Rule of Evidence 606. *Id.* at 577–78. It was only then that the *Peterson* court turned to determine if there were some other bases that the order could be affirmed in order to find the court's abuse of discretion was harmless. *Id.* at 578. In this portion of the opinion, the court determined that the only other basis that might permit the appellate court to affirm the trial court's new trial order would be as requested in the defendant's motion that the jury's answers were against the great weight and preponderance of the evidence. *Id.* at 578. A review of the evidence led the court to determine that the jury's verdict was not against the great weight and preponderance of the evidence. Therefore, the court held that the abuse of discretion of the trial court in violating Rule 606 was not harmless error. *Id.* at 579. Thus, the court reinstate[d] the results of the first trial. *Id.* at 580. The "cumbersome" review of the record was conducted only because the order of the trial court granting a new trial "[made] no mention of the merits of the case or the evidence considered by the jury." *Id.* at 578. In other words, a cumbersome review of the record was not something that was routinely undertaken by the federal appellate courts in reviewing, by way of appeal from the retrial of the case, the trial court's granting of a new trial following the first trial. The court's discussion of *Cruthirds* is also misleading. Contrary to the statement in *Toyota* that the "court consulted the record to evaluate the two stated grounds for granting new trial," the Fifth Circuit did not consult the record to evaluate the second stated ground for granting the new trial that the "verdict was against the great weight of evidence." Cruthirds v. RCI, Inc., 624 F.2d 632, 636 (5th Cir. 1980). The court instead determined that the record "revealed a fundamental error in the district court's instructions to the jury" and therefore it was not necessary to review the record to determine whether the verdict was against the great weight of the evidence. *Id.*

348. *Toyota*, 407 S.W.3d at 759–60 (reviewing the multi-volume trial record and concluding "that the record squarely conflicts with the trial judge's expressed reasons for granting new trial").

349. *Id.* at 761–62 (holding that the stated reasons for the granting of the new trial "lacked substantive merit").

350. *Id.* at 761. The merits-based review conducted by the court focused upon the trial court's limine orders, as the violation of that order was the specific reason given for granting the new trial. The first limine order precluded those portions of the deposition of the investigating officer regarding Mr. King's seat belt usage at the time of the accident. *Id.* at 749–50. The second limine order precluded any witness testifying about Mr. King's seat belt usage during the accident. *Id.* at 750. The redacted deposition of the investigating officer offered and played into the record by Toyota complied with those orders. *Id.* However, the record reflected that the Kings' counsel inadvertently read into the record a portion of the redacted deposition where the investigating officer stated that when investigating accidents he always looked at the seat belts "if they are not wearing one." *Id.* Kings' counsel did not make a motion to strike the statement, or make any limiting or curative motion, or move for a mistrial following his inadvertent publishing of the officer's testimony into the record. *Id.* at 751. The same redacted statement was read into the record by Toyota's counsel during his direct examination of one of his experts; and another of Toyota's experts stated into the record the same statement. *Id.* at 751, 753. In the first of these instances, the Kings' counsel objected, but did not move to strike the statement, nor did he request any limiting or curative instruction; while the second time he made no objection or motion. *Id.* at 751, 754. Finally, Toyota's counsel read the same statement to the jury during his closing argument. *Id.* at 754. At this time, the Kings' counsel made an objection that was sustained, but he did not move to strike the statement or request any curative or limiting instruction. *Id.*

fact, the court stated, "The record directly contravenes the order, including the trial court's acknowledgment during the trial that the Kings' attorney ha[d] read into the record what [Toyota] wanted published."[351]

The supreme court also rejected the other basis for the trial court's ordering of a new trial—as a sanction for Toyota's counsel reading the redacted portion of the investigating officer's statement during his closing argument[352]—for the reason that the supreme court determined that the trial court abused its discretion in sanctioning Toyota as there had been no "sanctionable conduct."[353] This holding was based upon the court's determination that the redacted portion of the investigating officer's deposition that was read to the jury during closing argument was, although inadvertently, introduced by the Kings' counsel, and once in the record "it was in for all purposes and a proper subject of argument."[354] Thus, the court conditionally granted mandamus relief.[355]

The opinion reinforces Justice O'Neill's articulated concerns in *Columbi*a of the "fruitless expense and delay"[356] through "interlocutory evidentiary review"[357] of a trial court's granting of motion for new trial.[358] In *Toyota* the court noted that it had undertaken a "'cumbersome review' of the multi-volume trial record".[359] This extensive review of the record was undertaken although the determination that the trial court had abused its discretion in granting the new trial was characterized as relatively straightforward[360] and "cut-and-dry."[361] While an admittedly easy case for determining that the trial court had abused its discretion, the amount of time taken in reaching such a determination is disturbing.[362] The trial

351. *Id.* at 761.

352. *In re* Toyota Motor Sales, U.S.A., Inc., 327 S.W.3d 302, 304 (Tex. App.—El Paso 2010, orig. proceeding) (noting that such action "inject[ed] an inadmissible, factually unsubstantiated conclusion and lay opinion" before the jury that was prejudicial and inflammatory), *mand. granted*, 407 S.W.3d 746, 761 (Tex. 2013).

353. *Toyota*, 407 S.W.3d at 761–62 (holding that the reading of the redacted portion of the officer's statement "during closing argument was appropriate").

354. *Id.* at 762.

355. *Id.*

356. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 220 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting).

357. *Id.* at 219 (O'Neill, J., dissenting).

358. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 219 (Tex. 2009) (orig. proceeding) (O'Neill, J., dissenting).

359. *Toyota*, 407 S.W.3d at 759–60.

360. *Id.* at 763 (Lehrmann, J., concurring).

361. *Id.* at 764 (Lehrmann, J., concurring).

362. The purpose of the Texas "[R]ules of [C]ivil [P]rocedure is to obtain a just, fair, equitable and impartial adjudication of the rights of the litigants . . . with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable." TEX. R. CIV. P. 1.

court entered its judgment in this case on July 13, 2009.[363] The court of appeals denied mandamus relief on September 29, 2010.[364] The supreme court rendered its decision on August 30, 2013.[365] Of course, this may not be the end of the delay in the *Toyota* case, as an appeal from the judgment to be entered by the trial court and another review of the record by one or two courts is still a possibility.[366] Furthermore, the implementation of the decision could place the appellate courts in the unusual position of having to conduct both an interlocutory review of some jury's findings and an appellate review other jury findings in the same case which will further exacerbate the costs and delay of the case.[367] While the supreme court has already held that a trial court will not be held to the same standards that a court of appeals would be held to in detailing its explanation for granting a new trial,[368] the court has stated that a mere "pro forma template" such as "a statement that a finding is against the great weight and preponderance of the evidence will not suffice."[369] In any event, the *Toyota* case will often create a difficult, if not impossible, task for a trial judge, who must now articulate reasons for the granting of a

363. *In re* Toyota Motor Sales, U.S.A., Inc., 327 S.W.3d 302, 303 (Tex. App.—El Paso 2010, orig. proceeding), *mand. granted*, 407 S.W.3d 746 (Tex. 2013).

364. *Id.* at 302.

365. *Toyota*, 407 S.W.3d at 746.

366. *In re* United Scaffolding, Inc., 377 S.W.3d 685, 690 (Tex. 2012) (orig. proceeding) (illustrating the lack of finality by granting mandamus for the second time).

367. A simple example will suffice to explain this proposition. If the trial court grants a new trial asserting there is no evidence or insufficient evidence to support a *particular* jury finding and explains how the evidence or lack thereof undermines the jury's finding. Under *Toyota*, on mandamus review the appellate court would be required to conduct an extensive record-bound, merits-based review of the reason given for the granting of a new trial. If the appellate court determines that the record does not support the trial court's stated reason, it will then conditionally grant mandamus relief and order the trial court to withdraw its new trial order and enter judgment on the verdict. Then, the party whose new trial had been set aside appeals the entry of the judgment on the verdict claiming no evidence or insufficient evidence to support other findings of the jury. In that appellate review, the court of appeals will need to conduct another review of the record and comply with the requirements of *Pool.* Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex, 1986).

368. *United Scaffolding*, 377 S.W.3d at 688.

369. *Id.* at 689. Of course, as Justice Lehrmann pointed out in her concurring opinion in *Toyota*, "This ground for a new trial raises yet another wrinkle, as [the] [Supreme] Court lacks jurisdiction to conduct factual sufficiency reviews." *Toyota*, 407 S.W.3d at 764 n.1 (Lehrmann, J., concurring). However, given the proclivity for the supreme court to expand its mandamus jurisprudence, it is not out of the question for the court to exercise jurisdiction to review these cases, similar to its review of the court of appeals on factual sufficiency points, and determine that the court of appeals applied the wrong standard in evaluating the factual sufficiency of the reasons given for the granting of a new trial. *See Pool*, 715 S.W.2d at 634–35 (holding "that the supreme court might take jurisdiction, notwithstanding the finality of judgments of the courts of civil appeals on fact questions, in order to determine if a correct standard had been applied by the intermediate courts").

new trial with references to the record as to the evidence or other events that occurred during the trial although the court reporter's record will in all likelihood not be transcribed.[370] Furthermore, unlike an appellate court, which can leisurely review the record in reaching its decision, the trial judge has a limited time to determine the merits of a motion for new trial.[371]

V. CONCLUSION

Columbia and its progeny have drastically changed the legal landscape as it relates to the balance of power between the appellate courts and the trial courts in Texas. These opinions have substantially altered time-respected legal principles solely in the name of preserving what the court perceived as the basic integrity of the jury system.[372] The decisions have taken the supreme court's intrusion into the discretionary rulings of the trial court to a new level. The court is no longer exercising its mandamus jurisprudence to police non-outcome determinative decisions of the trial court, but it has crossed the red line by giving itself the authority to determine the legal or factual merits of a trial court's granting of a new trial. The court now has the ability to substitute its opinion for that of the trial judge, whose presence and observation during the trial "are indispensable in evaluating whether the requisite good cause exists to justify setting aside a jury verdict and granting a new trial."[373] The changes that have been wrought by these three decisions should arouse the concern of anyone who believes in the rule of law and its corresponding principle of orderly progression of justice. The court should not within a few years overrule existing well-respected, time-honored legal principles and precedents for the sake of a

370. *Toyota*, 407 S.W.3d at 759 (evaluating whether the trial court's three-page order sufficiently referenced the record).

371. *See* TEX. R. CIV. P. 329b(c), (e) (stating that all timely filed motions for new trial that are not determined by the 75th day after the signed judgment shall be overruled by operation of law, and the trial court retains plenary power over the case for an additional thirty days after all timely filed motions for new trial are overruled). Thus, a trial judge must grant a new trial before his plenary power expires. During that time, he must now state his specific legally appropriate reasons and relate those reasons to the facts and circumstances of the case. However, once he has granted a motion for new trial, he has the power to ungrant it at any time while the case is still pending. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 228 (Tex. 2008) (orig. proceeding).

372. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, LP, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding) (noting that a vague explanation for granting new trials "does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury").

373. *Toyota*, 407 S.W.3d at 764 (Lehrmann, J., concurring) (citing *Columbia*, 290 S.W.3d at 212).

achieving its true desired goal of ultimate control over the trial court's discretionary privilege of granting new trials. By evaluating these decisions in light of the history of Texas jurisprudence, and not some vague policy justification, one is left with one, and only one, conclusion. The decisions are just wrong and should all be overruled. While one may find some agreement with the apparent concerns of the court about the possible abuse of the privilege given to trial courts in granting new trials, there are proper channels to address these concerns short of just arbitrarily jettisoning its own well-established precedents with the stroke of a pen, undermining and trampling on more than a 150 years of the court's own precedents.

As has been shown in this article, until *Columbia,* trial courts had been given broad discretion in their decisions to grant new trials. This authority was based upon the time-honored principle that the trial judge was in the best position to determine the validity, fairness, and integrity of the underlying jury trial. All presumptions were granted in the trial judge's favor. However, based upon the supreme court's mandamus jurisdiction to compel a court to enter judgment in a case, the court had enunciated two instances where mandamus relief could be issued to compel a court to enter a judgment and to set aside the granting of a new trial—void orders and erroneous determinations of conflicting jury answers. The development over the last sixty years of the abuse of discretion prong for mandamus relief has been a useful development when remaining true to its historical roots that mandamus would issue only when there was an arbitrary decision that had *no basis in law or fact*. While as a matter of policy it might be wise to require a trial judge to give reasons for the granting of a new trial, historically that has not been the case. However, given the *Toyota* case, one can see an outstanding argument for rejecting this approach. As Justice Wainwright noted, the mere giving of reasons is not relevant unless there is a way to evaluate and review those reasons.[374] The court in *Toyota* has now taken the next step in the progression of inserting appellate review of interlocutory trial court discretionary decisions. The review of the merits of new trial orders to determine if they are legally or factual correct is only the next step in the court's continued jurisdictional expansion without legislative authority. Notwithstanding its statement to the contrary,[375] *Columbia* and its progeny reflect the supreme

374. *In re* United Scaffolding, Inc., 377 S.W.3d 685, 693 (Tex. 2012) (orig. proceeding) (Wainwright, J., concurring).

375. *See Columbia*, 290 S.W.3d at 214 (disclaiming the assertion that the "decision is motivated by an underlying fear that some trial courts might abuse the privilege of their discretion").

court's contempt for the trial judges of Texas and reflect an air of superiority—indicating that the justices of the supreme court are more qualified than trial judges to ensure litigants receive a fair trial. *Columbia* and its progeny are only the tip of the iceberg. The floodgates have opened, and an intrusive supreme court will only continue to interfere and interrupt the trial process, leading to more time and expense and, more importantly, increased appellate court review of interlocutory orders not authorized by the legislature. The end result of *Columbia* and its progeny is to enmesh the court into a thicket from which it does not want to extricate itself.

The Texas Supreme Court failed to follow proper channels as suggested by the *Columbia* dissent through the venting process of ruling making that may have more fully addressed the validity of the perceived abuse of the trial court's discretion and developed a more reasoned approach to solving the potential abuse of privilege in the granting of new trials, if any. However, one cannot truly expect the court to retract its new jurisdictional power to control the granting of new trials, and therefore, the solution rests with the legislature. The legislature should move to restrict the growing exercise of mandamus jurisprudence by the Texas Supreme Court in the area of the historical discretion of trial courts to grant new trials. In that light, the author proposes the following amendments to the Government Code to read as follows:

22.002. Writ Power

(f) The supreme court or a justice of the supreme court may not issue writs of mandamus to compel a statutory county court judge, a statutory probate court judge or a district judge to give reasons for the granting of new trials or mistrials or to undertake any review of those decisions, except the supreme court or a justice of the supreme court may issue a writ of mandamus when the order granting the new trial is void or the trial court erroneously holds that the jury's answers to questions are irreconcilably in conflict.

22.221. Writ Power

(e) Each court of appeals for a court of appeals district may not issue writs of mandamus to compel a judge of a district or county court in the court of appeals district to give reasons for the granting of new trials or mistrials or to undertake any review of those decisions, except the court of appeals may issue a writ of mandamus when the order granting the new trial is void or the trial court erroneously holds that the jury's answers to questions are irreconcilably in conflict.

These proposed changes would return mandamus jurisprudence to its

pre-*Columbia* status by limiting the court's expansion of the *Womack* abuse of discretion standard in the area of the trial court's historical discretion in granting new trials. Anything short of legislation will not be effective in curtailing the Texas Supreme Court's jurisdictional expansion. In addition, a legislative enactment in this area could have a chilling effect on the Texas Supreme Court's desire to expand its mandamus authority even further because the court would then be aware that the legislature could further restrict its mandamus jurisdiction.