Memorandum

To: SCAC

From: Tracy Christopher

Date: December 1, 2014

Re: Motions for New Trial and Mandamus Review

The Texas Supreme Court has held that in a mandamus proceeding, an appellate court *may* conduct a "merits review" of the *correctness* of a new-trial order setting aside a jury verdict. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 757–59 (Tex. 2013) (orig. proceeding) (emphasis added). The court did not say when an appellate court could decline such a review.[1] The court explained that if, despite conformity with the procedural requirements, a trial court's articulated reasons were not "actually true," the new-trial order may be an abuse of discretion. *Id.* at 758. In *Toyota*, the court held that the record conflicted with the trial court's express reason for granting the new trial: improper jury argument. *Id.* at 761. In *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 602 (Tex. 2014) (orig. proceeding) (per curiam), the court held that a new trial was not warranted for jury misconduct after a juror talked to a corporate representative of the defendant during the trial but there was no evidence that the misconduct probably caused injury. In *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598 (Tex. 2014) (orig. proceeding) (per curiam), the court reversed the trial court's grant of a new trial due to a juror's failure to disclose information in voir dire because there was no evidence that the nondisclosure probably caused injury.

[1] The Fourteenth Court of Appeals declined mandamus review when the relator failed to provide a complete trial record. *See In re Wyatt Field Serv. Co.*, No. 14-13-00811-CV, 2013 WL 6506749, at *3 (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, orig. proceeding) (mem. op.) (per curiam). The relator refiled the petition with the complete record.

The supreme court seems to be applying a traditional interlocutory-appeal standard in support of the jury verdict rather than an abuse-of-discretion standard that defers to the trial court. I have spoken to several trial judges who have concluded that a trial judge must grant a mistrial rather than wait until after the jury verdict in the event of violations of a limine order or improper argument or if evidence of jury misconduct surfaces before a verdict.

After *Toyota,* the Sixth Court of Appeals reviewed an order granting a new trial on the ground that the jury's finding in favor of the defendants was against the great weight and preponderance of the evidence. *See In re Baker*, 420 S.W.3d 397, 400 (Tex. App—Texarkana 2014, orig. proceeding). The appellate court framed the issues in the case as whether the plaintiffs had met their burden to prove that the relator had breached his duty of care and that such negligence was a proximate cause of their injuries. *Id.* at 400. The court set forth the factual-sufficiency standard of review; reviewed all the evidence; observed that the case turned on the relator's credibility; and held that evidence was factually sufficient to support the adverse finding because the evidence was such that reasonable minds could differ on its meaning or the inferences and conclusions to be drawn from it. *Id.* at 402–04. The court therefore concluded that "the grant of the new trial improperly intruded on the jury's province," and that the trial court should have rendered judgment on the verdict. *Id.* at 404. In other words, the appellate court gave no deference to the trial judge's review of the evidence.

The Fifth Court of Appeals similarly has concluded that there is no reason to treat a factual-sufficiency challenge raised in a mandamus proceeding any differently than the same challenge raised in an appeal. "Thus, when a trial court incorrectly determines the evidence is factually insufficient and orders a new trial on that basis, it abuses its discretion. " *In re Zimmer, Inc.*, No. 05-14-00940-CV, 2014 WL 6613043, at *8 (Tex. App.—Dallas Nov. 21, 2014, orig. proceeding).

Given the state of the law, it appears that an interlocutory appeal may be the better route for review of an order granting a motion for new trial. This approach would clarify the standard of review and resolve the question of when an appellate court can decline mandamus review. If we want to maintain mandamus review, we should articulate the circumstances under which an appellate court can defer to a trial judge's decision or decline mandamus review.

I have not undertaken a thorough review of federal case law but federal courts generally review the grant of a new trial on appeal after the second trial. They also consider whether the grant of a new trial can be upheld on any ground—even if not articulated by the trial court. A decision to grant a new trial is accorded less deference than a decision denying the motion for new trial. In reviewing a grant of a new trial on the ground that the verdict is against the great weight of the evidence, some courts consider the simplicity of the issues, the extent to which the evidence is disputed, and whether any other undesirable occurrence happened at trial. *See Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930–31 (5th Cir. 1982).