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Supreme Court of Texas.
In re United Scaffolding, Inc., Relator.
No. 10-0526.

October 6, 2011.

Appearances:

Kathleen M. Kennedy, Mehaffy Weber, P.C., Beaumont, TX, for the Defendant-Realtor.
Chris M. Portner, Portner Bond, PLLC, Beaumont, TX, for the Plaintiffs-Real Parties in Interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0526 In re United Scaffolding, Inc.

MARSHAL: May it please the Court, Mrs. Kennedy will present argument for the Relators. Relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF KATHLEEN M. KENNEDY ON BEHALF OF THE PETITIONER

ATTORNEY KATHLEEN M. KENNEDY: May it please the Court, Your Honors, we are here today before this Court because the trial judge in this case abuses discretion by granting a new trial without stating specific reasons or relating his reasons to the evidence in this case.

JUSTICE EVA M. GUZMAN: How specific do they have to be?

ATTORNEY KATHLEEN M. KENNEDY: Your Honor, I think the specific, the specificity of the order should be able to give the parties notice of what it was that the judge thinks went array in that court.

JUSTICE EVA M. GUZMAN: One sentence, ten sentences, 15 sentences, what are you looking for here?

ATTORNEY KATHLEEN M. KENNEDY: In this case with it being factual insufficiency, I think directing maybe the witness, the document and what it is that the judge thought was wrong about the testimony or the document that was against the great weight and proponents of the evidence.

JUSTICE EVA M. GUZMAN: Should the judge conduct a full factual sufficiency review at this stage?

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ATTORNEY KATHLEEN M. KENNEDY: I don't think the judge would have to do that. I think that judge that sat through the trial, if it's something that's against the great weight, it should be something that the judge can pinpoint relatively quickly from his being in the trial. I don't think we're looking at a four-page appellate decision or a five-page. I think a one-page, a couple of paragraphs is enough to give the parties notice of what it is in the trial that the judge is looking at.

JUSTICE EVA M. GUZMAN: Given the standards that govern factual sufficiency reviews by courts of appeals so that they are trustworthy and so that they have significance, if you will, to the process. Cutting that process down to one page based on no record somehow ensures the reliability of the process more than the judge's short statement.

ATTORNEY KATHLEEN M. KENNEDY: There has to be some mental process within the order to know what the judge looked at and that the judge did look at the evidence in the case. Because in the case that we're here, I'm sorry, it's hard to say how long this process needs to be. If the judge has to go back and review the whole record, it doesn't seem that there's just something in the forefront of his mind that he saw during the case of the trial that he thinks is against the great weight and evidence. In the course of a trial, things happen or if something is wrong and the jury comes back with a verdict that is against a great weight, it should be something that is easy to point to and relay that in an order to the court to the parties to let them know what it is to give them notice.

JUSTICE EVA M. GUZMAN: Didn't, didn't--

JUSTICE DALE WAINWRIGHT: In the amended order in this case, Paragraph C, trial judge said among the four things listed, the great weight and preponderance of the evidence supports the finding that the determined negligence of defendant supports an award of past damages. None were awarded by the jury. Is that specific enough?

ATTORNEY KATHLEEN M. KENNEDY: Well, the great weight proponents of the evidence, what was it about the negligence that we were supposed to do past damages because in our case, all of his past damages were a preexisting degenerative disc disease, which typically you don't award money for. So I don't know what it is other than, because it was pretty much an uncontested issue that all his past was a degenerative condition and not a new type injury.

JUSTICE DALE WAINWRIGHT: And I understand there was a video of the Plaintiff was it washing his car and doing conduct that your position was shouldn't have been able to do with that type of back injury. It sounds like, however, you're perhaps disagreeing with the reason as opposed to perhaps asking for the reasons and that in order to address your concern, it may require an opinion of the trial judge. We can't go that far can we? I mean a written opinion like the court of appeals would write on factual sufficiency.

ATTORNEY KATHLEEN M. KENNEDY: Correct, I don't think it needs to go that far, but in this case and I guess the most candor way to answer your question, Your Honor, is I tried this case the first time. If I have to try it again, I will try it a second time. If I go back and try the second time, I will probably try it very close to the way I tried it the first time because it came out pretty well for me the first time. But with this order, if there's something that the judge saw to where he disagreed with what the jury did, I'd kind of like to know what that is so I don't do it again or I somehow change it so we're not back here in a year with these same issues because I do not know if he's talking about was it a problem with the witness, was it a problem with the document. Did I not ask enough foundation or predicate questions to an expert? What was it that how the jury got it wrong?

CHIEF JUSTICE WALLACE B. JEFFERSON: I think Justice Wainwright asks a good question in this sense. What if the, we send this back down and the trial gives us a ten-page analysis of why you thought the evidence didn't support what the verdict was, the outcome and you disagree with that analysis. You think it was, you

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know the evidence was perfectly in your favor and the trial court got it wrong. Would mandamus lie to reverse or mandamus the trial court because the reasons that he or she gave were wrong under your client's point of view. Is that mandamusable or do you just, or does Columbia and our prior cases stand for the proposition that the Court must give an explanation maybe with more specificity than here, but is that the end of the line?

ATTORNEY KATHLEEN M. KENNEDY: No, Your Honor, I believe the judge is going to have to do some detail of thought process.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay so there's a ten-page, you know, detailed thought process of why he's granting a new trial and you disagree with that. What do you do with that? Is there another mandamus at that point because you think he got it wrong?

ATTORNEY KATHLEEN M. KENNEDY: I think at that point it should be reviewable, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay. So we'll have a full-blown review then of a trial to determine whether the explanation was satisfactory or not. Doesn't that really just get rid of new trials?

ATTORNEY KATHLEEN M. KENNEDY: I'm sorry, say again.

CHIEF JUSTICE WALLACE B. JEFFERSON: There used to be a trial court had a lot of discretion to grant or deny new trial. It used to be under the rubric in the interest of fairness and justice because that trial court was there, saw the witnesses and we entrusted those judges with making those determinations and I think what you're saying is that is no longer the case because there's going to be a complete review of what used to be a discretionary ruling.

ATTORNEY KATHLEEN M. KENNEDY: I think because it has taken away a jury verdict, which is a constitutional right that a party has as to the jury trial, which I think extends to the jury verdict. To take away something that you have a constitutional right to without having to give that kind of information, I don't think is fair to the party and I don't think it upholds the integrity of --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, Columbia says you give that information, the trial court has to and I'm saying the trial court does and writes a 40-page opinion that says why he or she is granting a new trial. But what you're telling us is we're going to take the next step now that after that opinion is given and is full blown, there's going to be an appeal before there is even a truly final judgment.

ATTORNEY KATHLEEN M. KENNEDY: I think there would have to be. Asking the trial to court to do that kind of 40 or 10-page explanation of why it's granting a new order with it not being reviewable basically is saying do all this, do all the bells and whistles, tell me all the buzz words, show me that you did this, but then we're not going to review it. It seems to be asking them to do something that is never going to matter after the fact and whether they got the analysis right or wrong will never be reviewable and I'm kind of back in the beginning of in the interest of fairness and justice, it doesn't, it can't be reviewed. I still lose my verdict.

JUSTICE DEBRA H. LEHRMANN: Well, but, so what you're saying is it's not just that you want to know why, it's got to be right?

ATTORNEY KATHLEEN M. KENNEDY: Correct because we're talking about a constitutional right here to a jury trial and the verdict--

JUSTICE DEBRA H. LEHRMANN: Not really because I mean you're going to get another jury trial. It's not like that's it. It's not like they've granted it you know be notwithstanding what the jury did, right?

ATTORNEY KATHLEEN M. KENNEDY: That is correct, but once you go through all the time and expense

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of the first trial, you kind of want it to be right and whether the judge gets it right in granting a new trial or not granting a new trial is kind of important. I don't want to have it done right and it's arbitrarily overturned and it's taken away and I have to now expend the money to do it again and not knowing what it was in the trial maybe that if it's even right or wrong, it might force me to do something that I didn't need to do, change a witness, ask more questions, eliminate a witness.

CHIEF JUSTICE WALLACE B. JEFFERSON: What if the reason is the trial court says I've been, I was watching this trial intensely and it appeared to me that the jury was inattentive, that they were not listening. I saw them whispering amongst themselves. I saw a couple of them sleeping. It doesn't seem to me like this plaintiff or defendant had an adequate chance to present to this jury. What do you do with that sort of explanation?

ATTORNEY KATHLEEN M. KENNEDY: That has actually happened to me in trial and a lot of times that is brought to the attention of the litigants and the parties during the course of trial. I've not had that happen to where no one has seen it during the course of the trial. I'm sure it happens, but I know when it does happen, either an attorney brings it to the judge's attention or the judge has brought it to our attention and that's usually discussed.

CHIEF JUSTICE WALLACE B. JEFFERSON: And the trial court grants a new trial on that basis and you disagree, you think the jury was very attentive and so do we have a review of, I mean do we call the jurors in? Because you're saying we're going to be reviewing all these orders granting new trial now and the explanations for them. So what do you do in that instance?

ATTORNEY KATHLEEN M. KENNEDY: That is a very hard question to answer to think about what's going through the judge's mind and the juror's mind because you can't review the record to determine what the jury was doing whether they were attentive or not. That's a quite different issue. Mine's specifically more on the factual insufficiency issue.

JUSTICE DEBRA H. LEHRMANN: Shouldn't we trust trial judges to a certain extent to believe that they're going to be doing what they should be doing, what they've sworn they would do?

ATTORNEY KATHLEEN M. KENNEDY: Absolutely. I completely agree with that; however, we are a product of our backgrounds and our experiences. In fact, one of the justices on this Court back when In re Columbia was argued before you, Justice Brister made a comment about his personal experience of a judge telling him to pay the plaintiff $10,000 or they would grant a new trial and of course, he refused to pay it and the new trial was granted. Again, that's happened to me also in the past. While it may not be prevalent, unfortunately, it may happen. But I don't think what I'm asking this Court to consider is to keep judges from doing something that maybe we would all frown upon, but it's more to protect the expectations that the parties have and when we get a verdict, wanting to keep it or at least being told why the judge thinks it should be taken away.

JUSTICE EVA M. GUZMAN: In speaking about that, I guess Justice Gaultney in his dissent was or disagreed with the majority's focus on the process that the trial court engaged in to arrive at its articulated reasons for granting the new trial. And you seem to advocate a process that envisions a full-blown factual sufficiency review. Where is that middle ground? Do you think that would be workable in a court room, a real-live courtroom after a 10 or 12-week trial?

ATTORNEY KATHLEEN M. KENNEDY: The only way I can answer your question is from my background and experience. A lot of times when things happen, you know trial, the litigants are aware when things are a little hokey or things are different and judges are aware of it. And if it's obvious, it's going to be easy to ascertain and it may not even be something that would be. I'm sorry; I'm not answering your question.

JUSTICE EVA M. GUZMAN: No, no. You are, I have a follow-up, but go ahead.

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ATTORNEY KATHLEEN M. KENNEDY: How far it needs to go into full-blown evidentiary and I guess the issue is if there's not a motion for a new trial, the person who's alleging a factual insufficiency or that the jury's verdict is against a great weight, they have the right to appeal that. So they still have the right to appeal, but if there's a motion for a new trial, I think there has to be a review of how the judge looked at the evidence so it's not just an arbitrary decision because if you have a good process, but not a good result, it doesn't make it right.

JUSTICE EVA M. GUZMAN: So you would even further limit the trial court's discretion to grant the new trials even more so than it's been limited by In re Columbia?

ATTORNEY KATHLEEN M. KENNEDY: I don't think I would limit the trial court's decision. I think because the party who's alleging the factual insufficiency or against the great weight argument has the right to appeal. I think if it's something that the judge can put their hands on, they're going to do it when there needs to be a new trial, but if it's one of these such as like I would say this case. This case I just don't see where there was any evidence against the great weight and preponderance of the evidence. And if there was, maybe they would just do the judgment on the verdict and let the party who's arguing that appeal the issue because it's going to end up being a complete review of the factual evidence anyway.

JUSTICE EVA M. GUZMAN: You just disagree with the trial court's conclusion that it was against the great weight?

ATTORNEY KATHLEEN M. KENNEDY: I do. I disagree because conflicting evidence doesn't mean against the great weight. And if you look at his order--

JUSTICE EVA M. GUZMAN: And would more reasons in the trial court's order allay your concerns about --

ATTORNEY KATHLEEN M. KENNEDY: I'm sorry I couldn't hear.

JUSTICE EVA M. GUZMAN: If the trial court had given four or five reasons, would that be good enough of why it was against the great weight or would you disagree with that too?

ATTORNEY KATHLEEN M. KENNEDY: I think if the trial court could pinpoint what the evidence was that he's relying on would be sufficient because in his order, it just states that he just reconsiders the plaintiff's motion for new trial. It didn't say he reconsidered the defendants or he considered all the evidence. It's just he just reconsidered the plaintiff's motion.

JUSTICE EVA M. GUZMAN: Now I don't have it in front of me, but did the plaintiff's motion allege specifics as they relate to this issue?

ATTORNEY KATHLEEN M. KENNEDY: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: Alright. And so the judge considered those and said so and so those are reasons right there. You disagree with those too.

ATTORNEY KATHLEEN M. KENNEDY: And again, all the issues that the plaintiff alleged in their motion for continuance, of course, we had the other conflicting or the additional if things were taken out of context, we gave the whole reason for it because most of the stuff in the case was really not contested and I just don't see where there was anything that the jury did not take into account and if there's something that just wasn't there or the jury disregarded, I would like to know what that is.

JUSTICE EVA M. GUZMAN: So there's a motion for new trial that outlines reasons, then you came back with a response for the motion to new trial outlining your reasons for denying the motion. The trial court, who sat through the trial, observed the jurors, observed the witnesses, went through that process with you, decided that

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it agreed with the reasons fully articulated in the plaintiff's motion for a new trial. And then said so in an order, I read the motion and I agree with it, but that's not specific enough for you?

ATTORNEY KATHLEEN M. KENNEDY: No, Your Honor. I think at this point, looking at the evidence as a whole and detailing what it was that was against the great weight and preponderance of the evidence. If it's something that the judge can specifically say in an order that there's something against the great weight and preponderance of the evidence, I think it should be easy for them to say if it was a witness or a document if you give us -- I'm sorry.

JUSTICE EVA M. GUZMAN: Should the judge have had someone retype the reasons articulated in the motion for new trial into this order versus saying I've reconsidered their motion for new trial and I grant it. So would it be better if the judge had had someone retype the reasons in that motion for new trial that he or she agreed with and included them in this order? Would that work?

ATTORNEY KATHLEEN M. KENNEDY: I think that would work. Looking at the jury as a, the jury's answer to question number 3 is against the great weight and preponderance of the evidence. I just want to know why.

JUSTICE EVA M. GUZMAN: Well, if that's enough then why isn't it enough for the trial court to say I've reconsidered their motion for new trial and I grant it? Why can't we look at that and say the judge relied on the reasons articulated in that motion for a new trial? Because you said if he had put them in the order, that would be enough.

ATTORNEY KATHLEEN M. KENNEDY: If he had -- well, there was multiple witnesses that were stated in the plaintiff's motion for new trial. There was multiple witnesses that were related to different types of evidence, experts, lay witnesses, what was it in that? Was it every single witness or was it just one witness?

JUSTICE EVA M. GUZMAN: But he said after reconsidering James and Lisa's motion for a new trial and you tell me, I don't have it in front of me, but you tell me that there were specific rationale articulated in that motion for a new trial to support the argument that it was against the great weight. And you told me that if the trial court had taken those arguments and included them in the order, then that would suffice to comply with its duty under In re Columbia. So I'm asking you why we can't look at this and decide that the trial court relied on those reasons as set forth in that motion for new trial?

ATTORNEY KATHLEEN M. KENNEDY: Because those reasons were, some of them were taken out of context. It was not a full global. You had one witness saying one thing, but you didn't have the witness that was opposite. It didn't weigh the evidence. It took away the discretion of the jury, of the credibility. Basically what, the way I read this is, okay, plaintiff, I agree with you with you saying this one witness basically is uncontested, which it wasn't. I think it's very one-sided and it seems very arbitrary to just agree with one side without taking all the evidence. Had the order said after reconsidering the plaintiff's motion for a new trial and the Respondent's and the defendant's response to where all the evidence was taken as a whole to where you could see the conflicting evidence. At this point, you have no conflicting evidence. You just have one person's side and that seems to be very arbitrary.

JUSTICE EVA M. GUZMAN: It clearly had your response; the trial court did before it.

ATTORNEY KATHLEEN M. KENNEDY: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: And we have to presume it the trial court complied with its duty and obligation to consider all of the pleadings before it. To say that trial courts don't do that is a bit of a stretch. I mean they may ignore one side. They may decide that you haven't been persuasive enough, but on this record, I don't know that there's anything to suggest that this trial court didn't read your response.

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ATTORNEY KATHLEEN M. KENNEDY: Your Honor, unfortunately, I have to take this case by itself instead of lumping multiple cases together. You have a case where liability was contested and you have this case where damages was contested. Very few significant points were hotly contested. Most of them, such as the damages, it was all preexisting, it was all degenerative, the liability part. All the witnesses basically said that my clients weren't there and I know I'm kind of getting off, but that we weren't there and if we weren't there, we couldn't have updated the scaffolding, which is an OSHA provision, it has to happen. If we weren't there, it couldn't have been updated and if it wasn't updated, nobody should have been on it. That was the testimony. The damages was all preexisting. For the judge to now say the jury got it wrong and took away the jury verdict, I understand, I respect and understand what you're saying about going through this.

JUSTICE EVA M. GUZMAN: I apologize; I did not see the red light either. I do apologize.

ATTORNEY KATHLEEN M. KENNEDY: I'm sorry. I didn't either. I'll reserve mine until --

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay we'll hear from you on rebuttal and the Court is ready to hear argument from the Real Parties in Interest.

MARSHAL: May it please the Court, Mr. Portner will present argument for the Real Parties in Interest.

ORAL ARGUMENT OF CHRIS M. PORTNER ON BEHALF OF THE RESPONDENT

ATTORNEY CHRIS M. PORTNER: May it please the Court, when I first read In re Columbia, it really is an interesting decision because the first thing that In re Columbia does is it acknowledges the significant discretion that a trial court has in granting new trials. And the other thing that Columbia does is that it clearly sets forth that the standards for overturning a new trial are different for a trial court than they are for a court of appeals. And at that point, the Court said that this is an, that Columbia was an exceptional circumstance and that because of the exceptional circumstance that occurred in Columbia, that it was appropriate to mandamus the new trial order. And basically what the Court determined was that in the interest of justice was too vague and after the parties went through the time and expense of a jury trial, they deserved more. They deserved to understand why their jury trial was taken away, very similar to what we heard today. And when I first read that, it confused me a little bit because I compared it to a motion for summary judgment. And a motion for summary judgment, a party can list ten reasons for a motion and the court can say granted and that's sufficient. And so at first, I couldn't really reconcile the two and I went back and reread Columbia and at that point, it was very clear, it was right in front of me in the order. What it said was that in for a new trial, a court cannot only grant a new trial for the reasons set forth in the motion as in a summary judgment, but it can also grant it for his own reasons. And so the Columbia court is about the process and what the Columbia court held was that the litigants deserved more.

JUSTICE DALE WAINWRIGHT: But with a summary judgment you can't grant it for reasons not stated in the motion.

ATTORNEY CHRIS M. PORTNER: Yes, Your Honor, exactly.

JUSTICE DALE WAINWRIGHT: There's a significant difference isn't there?

ATTORNEY CHRIS M. PORTNER: Yes and so in a summary judgment, you can only grant it within the reasons of the motion. In a new trial, you could grant it in the reasons stated in the motion or for another reason.

JUSTICE DALE WAINWRIGHT: So if a trial judge just says new trial granted in the interest of justice and fairness, you don't know what the reasons are.

ATTORNEY CHRIS M. PORTNER: Exactly, Your Honor.

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JUSTICE DALE WAINWRIGHT: Which is an important difference isn't it?

ATTORNEY CHRIS M. PORTNER: Yes sir. And so what happened with Columbia is the Court came forward and said if you're going to grant a motion for a new trial, you have to give a reason and it's because of that difference, so that the litigants can go back after a trial and understand what occurred. And I think clearly here, the trial court, the court has discussed the order at some length, the court clearly gave a reason and the court clearly complied with Columbia.

JUSTICE DALE WAINWRIGHT: [Inaudible] some reasons, number four, I'm sorry Paragraph D in the interest of justice and fairness. We just said that's not a valid reason.

ATTORNEY CHRIS M. PORTNER: I believe, Your Honor, the clear--

JUSTICE DALE WAINWRIGHT: That shouldn't be in the order should it?

ATTORNEY CHRIS M. PORTNER: I think clearly D by itself is not sufficient. Whether --

JUSTICE DALE WAINWRIGHT: If a trial judge puts D in an order, it's going to get the attention of the appellate courts isn't it?

ATTORNEY CHRIS M. PORTNER: Yes, sir, and I think clearly, if it was just D In re Columbia is directly on point and clearly it would be improper. If it's an additional reason with the others, I'm not sure about that. I think that would probably be okay. So the trial court complied, in my opinion, with In re Columbia. What United Scaffolding has come here today and asked this Court to do is not to enforce Columbia, but what United Scaffolding has asked this Court to do is radically extend In re Columbia, not just require the court to give a reason.

JUSTICE DALE WAINWRIGHT: Let me circle back around to our discussion about D in the interest of fairness and justice as a basis for granting the new trial.

ATTORNEY CHRIS M. PORTNER: Yes, sir.

JUSTICE DALE WAINWRIGHT: All the, the first three reasons are at the end have and/or after them.

ATTORNEY CHRIS M. PORTNER: Yes, sir.

JUSTICE DALE WAINWRIGHT: So reading that with and/or in there, it's possible that the only real reason is D, in the interest of fairness and justice.

ATTORNEY CHRIS M. PORTNER: I don't believe that's correct, Your Honor, because that could only be correct if, I guess if the trial judge were thumbing his nose at this Court. I don't believe that's the case. I think when the order is read, I think it's clear.

JUSTICE DALE WAINWRIGHT: That wouldn't be a good idea, would it?

ATTORNEY CHRIS M. PORTNER: No, I don't think that would be a good idea at all, Your Honor, but clearly this, this Court sent an order down and said don't do it in just the interest of justice. I don't think there's many trial courts that would send an order right back that said oh I'm just going to put an or in here and make it mean in the interest of justice. I don't think that's the case for that reason, Your Honor.

JUSTICE DALE WAINWRIGHT: Although the Beaumont Court of Appeals that reviewed this case before it came here had said in 1938 that and slash or is an abominable invention, devoid of meaning, incapable of classi-

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fication by rules of grammar and syntax and there's a number of authorities that talk about how it's a freakish fad and it's an accuracy-destroying symbol and it's hard to really know what and slash or means when we're trying to be precise in a legal context, isn't it?

ATTORNEY CHRIS M. PORTNER: Yea and Your Honor, again, this is a little bit of a unique case for me because I wasn't I was retained after briefing was finished in this case. The plaintiff's lawyer passed away and I came into this case after that. So I wasn't there at the trial level. But I think what the order says clearly is there's four reasons that the judge gave and as the Beaumont Court of Appeals analyzed it, each one of those was a reason that the court believed that the order should be granted.

JUSTICE DEBRA H. LEHRMANN: Would it have mattered if those were semicolons rather then and or?

ATTORNEY CHRIS M. PORTNER: Well, I think, now we're getting a little bit, I think if they meant and or it probably should have been a semicolon after the first, well after all three and then an and or after C, I think would have been the better way to write it. But I think clearly what the judge meant here was these are my four reasons and I think any one of them would be good enough, clearly out of the interest of justice. But if one of them is not, I'm going to relay on the others. I think, I think we have a tremendous amount of uncertainty right now with what trial judges are supposed to do with new trials and perhaps the order wasn't written as, as well as it could have been.

JUSTICE DEBRA H. LEHRMANN: I was going to say if it's sloppy, what's the result of that? If it's sloppy, does that mean it's not sufficiently --

ATTORNEY CHRIS M. PORTNER: I don't believe it's enough for mandamus, Your Honor. I believe that it could have been written better, but it's my opinion that if it had said and forget the or for a minute, and this Court looked at it and said you know what? We disagree with any number of reasons, as long as one of them was, well let me back up. I don't think this Court has the ability to look at the reasons; it's the process. And so the court has come up with an order that has specificity so that the parties understand why it was granted. Now could it have been clearer? Absolutely.

JUSTICE EVA M. GUZMAN: Why have reasons if they have no meaning? Why have reasons if we can't even consider whether they're valid or not.

ATTORNEY CHRIS M. PORTNER: Well, Your Honor, that's a good question and I think the Columbia court was focused on the process and when you go through the time and expense of a jury trial, you have the right to understand why the jury trial was overturned if a trial court decides that he wants to do that. And when the trial judge could do it for any reason including things not in the motion, what Columbia addressed was you at least have to tell them, but remember this, this Court doesn't have jurisdiction due to factual sufficiency on mandamus of a new trial order.

JUSTICE PAUL W. GREEN: So as long as any trial judge on a motion for a new trial issues an order that says something like because the jury's answer to question number three is against the great weight and preponderance of the evidence, we're done.

ATTORNEY CHRIS M. PORTNER: I believe that's specific enough, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, but that takes up right back to in the interest of justice and fairness and this Court decided we're not going to let judges use magic words and insulate their new trial orders from review. I mean that's the big picture. So those magic words, maybe those aren't enough and what we're struggling to find is how far must a trial court go in explaining its reasons. Now in this case, for example, it's against the great weight and preponderance. I presume you agree that this is a contested trial. There's evidence on both sides and against the great weight means that the evidence overwhelmingly preponderated the

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other way, toward a yes answer rather than a no answer and it seems logical to think the trial court who heard all the evidence could say okay, here's the way, here's the bulk of the evidence went this way, there's a little bit of evidence that way and the, an affirmative answer was almost required. Not as a matter of law, but almost based on the weight of this evidence. Why couldn't, why should we ask trial judges to do that?

ATTORNEY CHRIS M. PORTNER: Well, Your Honor, again, I think the issue is you can't read the order in a vacuum. There was a motion that was filed that was a very detailed motion and had significant evidence attached to it. Response, Relator responded with a motion with evidence attached to it. In light of all of that, the court looked at it and said, for example, on any of the jury's answer to question number three is against the great weight and preponderance of the evidence. So it's not just that. It's based upon the motion, the response and then the order and when you read all those together, it's, the Court has been specific enough to satisfy Columbia. It wouldn't change anything if you're taking a word processor and copied the reasons that were set forth in the motion. Nothing would be different. We know what the reasons were and the concern addressed stated in Columbia is that a party that has a verdict taken away from it understand why that occurred. And I think in light of Columbia, a litigant is going to have a lot clearer understanding of why a jury verdict was taken away than a litigant will that loses a summary judgment, ironically.

JUSTICE NATHAN L. HECHT: Sounds as if you don't disagree with that.

ATTORNEY CHRIS M. PORTNER: The reasoning?

JUSTICE NATHAN L. HECHT: No, that that's a good process.

ATTORNEY CHRIS M. PORTNER: Your Honor, if the Court wants to advise courts that we think you should put more detail in orders, I don't have any problem with that at all. It, transparency is always a good thing. However, if the Court doesn't believe the order has enough evidence supported in it, that's not a basis for mandamus.

JUSTICE NATHAN L. HECHT: If the reason were demonstrably wrong, do you think it should be reviewed on the merits?

ATTORNEY CHRIS M. PORTNER: It depends, Your Honor, I guess I'm not sure what you're asking me. For example, one of the questions that was asked in--

JUSTICE NATHAN L. HECHT: Let me give you an example.

ATTORNEY CHRIS M. PORTNER: Okay.

JUSTICE NATHAN L. HECHT: No evidence. The judge says there was an award of X damages and there was no evidence to support that and there clearly was, there was, he just, maybe it was against the great weight of the evidence, he could say that, but he can't say there wasn't any evidence because there was testimony. It wasn't conclusory; it was there. Should you review that or?

ATTORNEY CHRIS M. PORTNER: On mandamus, Your Honor?

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY CHRIS M. PORTNER: Absolutely not, I don't believe that's appropriate.

JUSTICE NATHAN L. HECHT: Just go back and try it again?

ATTORNEY CHRIS M. PORTNER: Yes, Your Honor. The example that was given, I think, in the In re Co-

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lumbia oral argument, somebody said well what if a trial court came forward and overturned or granted a new trial because he didn't like one of the parties race. I think that was--

JUSTICE NATHAN L. HECHT: Like one of the parties what?

ATTORNEY CHRIS M. PORTNER: Race.

JUSTICE NATHAN L. HECHT: Yea.

ATTORNEY CHRIS M. PORTNER: I believe that question was asked in the oral argument. If a new trial were granted for that reason, I think in the reality of what would occur is that judge would be removed from the case. You'd have a new judge and you'd ask the new judge to reconsider the motion for new trial. And so if it's an improper reason in the sense of an ethical violation or something like that, I think you would address it that way. However, if it's an ethical just the judge just made a mistake I don't think that can be reviewed on a mandamus.

JUSTICE DALE WAINWRIGHT: What if the judge entered a judgment that granted damages for negligent infliction of emotional distress?

ATTORNEY CHRIS M. PORTNER: If the judge entered a judgment for --

JUSTICE DALE WAINWRIGHT: Awards damages for negligence infliction of emotional distress.

ATTORNEY CHRIS M. PORTNER: And then the party sought a new trial.

JUSTICE DALE WAINWRIGHT: Judge grants it; should we review that? Clearly wrong on the law.

ATTORNEY CHRIS M. PORTNER: Okay. I'm sorry, Your Honor. The judge--

JUSTICE DALE WAINWRIGHT: Negligent infliction of emotional distress does not exist in Texas.

ATTORNEY CHRIS M. PORTNER: Yes, sir.

JUSTICE DALE WAINWRIGHT: You can't get damages for it.

ATTORNEY CHRIS M. PORTNER: True.

JUSTICE DALE WAINWRIGHT: Judge enters a judgment awarding damages for it.

ATTORNEY CHRIS M. PORTNER: Okay.

JUSTICE DALE WAINWRIGHT: Is that the type of thing that we should be able to review on mandamus?

ATTORNEY CHRIS M. PORTNER: And so the party that judgment was entered against filed a motion for new trial which was granted? Is that the scenario?

JUSTICE DALE WAINWRIGHT: You're talking about the types of things that could or should not be looked at on mandamus by the court of appeals. The judge enters a judgment on a theory of law that does not exist in Texas.

ATTORNEY CHRIS M. PORTNER: Okay.

JUSTICE DALE WAINWRIGHT: The example negligent infliction. Is that something we should review on

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mandamus?

ATTORNEY CHRIS M. PORTNER: On mandamus in a new trial setting, I don't believe so Your Honor. I guess if the trial judge granted a new trial for failure to award negligent infliction of emotional distress, I still don't believe that that's something that this Court would have jurisdiction to.

JUSTICE DALE WAINWRIGHT: To anything we should review then?

ATTORNEY CHRIS M. PORTNER: On mandamus?

JUSTICE DALE WAINWRIGHT: Uh-huh, in this context on the merits.

ATTORNEY CHRIS M. PORTNER: Well, I think after In re Columbia, the process is important.

JUSTICE DALE WAINWRIGHT: But not on the merits?

ATTORNEY CHRIS M. PORTNER: Not on the merits, no, Your Honor.

JUSTICE EVA M. GUZMAN: What is the standard though for mandamus review in the context of some outlier order let's go back to the standard of review in a mandamus proceeding, a clear abuse of discretion or a violation of a duty to follow the law. In a context like that, would a court have discretion to just completely disregard Texas law?

ATTORNEY CHRIS M. PORTNER: Well, no and I think it could be mandamus for in the [inaudible] infliction of emotional distress situation perhaps, I'm not sure perhaps there's an issue where that could be mandamus for reasons other than a new trial. But in the new trial set, I'm not exactly sure the hypothetical I'm being asked, but if, if basically what we're talking about is the trial court just made a mistake, a good faith ethical mistake in granting a motion for new trial and went through the process, then I don't believe that can be reviewed.

JUSTICE EVA M. GUZMAN: There are mistakes and then there are flat out refusals to follow the law. Is there a difference in the hypothetical that was posed to you?

ATTORNEY CHRIS M. PORTNER: I guess if the judge flat out refused to follow the law and a new trial were granted depending on the severity of the mistake, the parties are free to try to disqualify the court and have a new judge rule on that matter, but it's a trial court matter. It's not a matter that can be addressed on appeal, on mandamus appealing a new trial order.

CHIEF JUSTICE WALLACE B. JEFFERSON: We're struggling on the scope of these orders and that sort of thing, but one thing is pretty clear and I bet you get some unanimity on this Court that the, there are many competent trial courts out there that do their best to explain to the parties, to the lawyers here's exactly why I'm doing what I'm doing. I mean there are many, in summary judgment context that say I'm not going to grant it on grounds A, B and C, but these other two, I think are satisfied as a matter of law. And what is the problem with instructing our trial courts to give the lawyers and give the parties a real basis, a substantive reason why a new trial is granted. So I know there are a lot of arguments presented in the motion for new trial and in the response, but why can't, why shouldn't we expect the trial court to say here is the area that I'm most concerned with on damages or on this person's testimony or on liability. This is what concerns me the most. Put it in the order and then the lawyers in trial number two, if it's not over turned by mandamus, know where to concentrate their efforts. What's really wrong with that?

ATTORNEY CHRIS M. PORTNER: First of all, I believe that occurred in this case, Your Honor. Second of all, there's nothing wrong with it. There's nothing wrong with this Court telling trial courts that we'd like you be as specific as you can be. The question isn't is there anything wrong with that. The question is, is it mandamus-

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able if the trial court doesn't do it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, before Columbia, it wasn't mandamusable when the trial court said in the interest of justice and fairness. So the Court is obviously willing to look at these new trial orders and write the law that is going to direct trial courts' conduct in the future. So if there's nothing wrong with it, then maybe we should take that next step, which you call radical.

ATTORNEY CHRIS M. PORTNER: Again, Your Honor, I think in Columbia the Court said tell us the reasons, you have to tell us the reason and the trial Court in this case did. It's one thing to say tell us the reason. It's another thing to say conduct a full factual sufficiency review. In Columbia, the court acknowledged that the standard for trial court is different than the standard for a court of appeals in overturning a jury verdict and all the parties to this case know why the trial court did what he did. If you look at the facts of this case, it's a little bit of an unusual case. I would respectfully disagree with Relator's Counsel about some of the damages issues. I believe it was aggravation case. I believe there was a preexisting condition; nobody's going to disagree with that. But I believe Plaintiff's position from the beginning was that it, the past damages were aggravation and I don't think that any evidence was put forward to contradict that other than Counsel's cross examination of Plaintiff's evidence, which is perfectly permissible. But the zero damage issue was addressed at the trial court level. It was addressed at the court of appeals's level. It was addressed before this Court. Everyone knows what the issues were in this case. And what Columbia says is that the litigants need to be told why the new trial was granted. That there's not an evidentiary requirement for the order. There's not a factual sufficiency requirement; respectfully I don't believe there should be because this Court doesn't have the power to review the factual sufficiency, review if the trial court did want it. That's beyond the scope of mandamus authority of this Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, there's Poole v. Ford Motor Company, right?

ATTORNEY CHRIS M. PORTNER: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: We didn't have factual sufficiency review, but we could review the analysis of the court of appeals.

ATTORNEY CHRIS M. PORTNER: The court of appeals, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY CHRIS M. PORTNER: But not the trial court. And in Columbia clearly states that that separation remains. And so there's nothing wrong with asking a trial court to be as detailed as the court would like it to be. It's another thing to say if you don't, it's going to be mandamusable. And I would, under any standard, I think the reasons given by the court in this case were very specific. This is the question; question number three was against the great weight and preponderance of the evidence and then B and C just backed that up. And so the court was very specific and to come in, if this Court were to look at this today and say well, we would have like it if the judge had written a little more detail about A, B and C. That's okay, but it's not enough to say that it rose to the level of mandamus and that's why we're here, Your Honor. The trial court complied within In re Columbia.

JUSTICE DALE WAINWRIGHT: Well, Columbia also says that not only that the trial court should be clearly, should give clearly identified and reasonably specific reasons for granting the new trial, but those reasons must be "valid". Must have a valid basis.

ATTORNEY CHRIS M. PORTNER: Absolutely, Your Honor, absolutely. And in this--

JUSTICE DALE WAINWRIGHT: How do we determine this unless we at least delve into the merits some?

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ATTORNEY CHRIS M. PORTNER: Well, I believe with the valid basis is that it's against the great weight and preponderance of the evidence. My opinion--

JUSTICE DALE WAINWRIGHT: How do we know?

ATTORNEY CHRIS M. PORTNER: Well, it doesn't matter if it's right or not. What matters is that that is a valid basis. In other words, we're back to the oral question, the question that was asked in oral argument in Columbia where it says, oh, I didn't like the plaintiff's race and so I granted a new trial. That's not a valid basis. However, if the reason is it's again the great weight and preponderance of the evidence, that's a valid basis and this Court does not have the authority to conduct a factual sufficiency review of that finding. Furthermore, from a practical standpoint, this Court doesn't have the full record. So how does this Court conduct a factual sufficiency finding without the record?

JUSTICE DALE WAINWRIGHT: No one's arguing we should conduct a factual sufficiency review, but I'm not sure that saying, putting a reason that is under the law of Texas, one of the valid reasons for reversing or disagreeing with the jury verdict is the same as what we meant in Columbia. Columbia said there must be a valid basis for setting aside the jury verdict. I take that to mean and understood it to mean that there must be a valid reason in that case not just a valid reason in Dorsaneo for doing this type of thing in the abstract.

ATTORNEY CHRIS M. PORTNER: No, Your Honor, and one of the things that the Court points out in Columbia is that the Court assumes, absent of record otherwise that the trial court is acting in good faith. And when a trial court enters an order that says that it's against the great weight and preponderance of the evidence in his opinion, the Court has to take him at his word short of an evidentiary basis to suggest otherwise.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

ATTORNEY CHRIS M. PORTNER: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. Court will hear rebuttal.

REBUTTAL ARGUMENT OF KATHLEEN M. KENNEDY ON BEHALF OF PETITIONER

ATTORNEY KATHLEEN M. KENNEDY: Your Honors, I believe in this case basically what the issues have boiled down to is how specific does the trial judge need to be and the order granting a new trial and what, if any, would be the extent of review of those reasons? This Court in Poole, basically commented on the court of appeals in quoting In re King's Estate that there are occasionally opinions in which that the court of appeals has merely substituted judgment for that of the jury. Those opinions crouch that holding with the necessity or factual insufficiency or against the great weight and preponderance language without providing analysis of the evidence stating the basis for the conclusions. Coming back to the questions that were posed earlier about how specific does it need to be. How lengthy it needs to be is one question, but specific, I think we need to know why the judge thinks the jury got it wrong. Just saying that there's conflict or this is the greater weight is more substituting his judgment for that of the jury. Why did the jury get it wrong? Why are you taking away? You may believe differently or you may think someone had different credibility, Your Honor, but why did the jury get it wrong? And I think seeing the actual thought process is what needs to be reviewed because otherwise, we're right back at the beginning. If they're just going to do the bells and whistles and the buzz words and it's never going to be reviewed, we might as well just kind of go back to square one in the interest of fairness and justice. It doesn't seem to do anything but give us notice regardless of if it's a right or wrong decision.

JUSTICE EVA M. GUZMAN: To give you a greater opportunity to hash it out in front of the trial court seeing as how they do have the additional burden of articulating some reasons, doesn't that give you a really good opportunity to, to fight it out in front of the trial court at that time?

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ATTORNEY KATHLEEN M. KENNEDY: Yes, Your Honor, it does. And in looking at our new trial motion, motion for new trial hearing, there was really nothing that was given to us from the judge. He was very silent on it and I'm not saying anything ill of that he did or didn't do something. I'm not saying that whatsoever. But as the litigant who had the jury verdict taken away, it would be nice to see in this motion him detailing what the evidence was that the jury got wrong or that he's saying is against the great weight. Why did the jury get it wrong? Because in looking at it from my perspective, it looks like he's just substituting his judgment for that of the jury because when I read each of these A, B and C, even if I don't use the and or, or at the end my question always comes as to why? Why is it against the great weight? What was it that the jury got wrong?

JUSTICE EVA M. GUZMAN: They say in the motion for new trial about that. Like why did they say it was in the, the other side say in that motion for new trial? I mean if you know if you don't, I'll look at it later.

ATTORNEY KATHLEEN M. KENNEDY: Your Honor, it's just like in a trial, us attorneys tend to put a spin on the evidence. We use one little snippet that's good, but then the next sentence wasn't good. That's kind of what we do to be persuasive. We don't usually give the whole picture. I'm not saying that that's what's done in this case, but that's kind of the point I'm trying to make in reviewing the whole record so you see the good and the bad altogether and you weigh it together because when you only have one side and I have to point out, if we sat here today and you only heard my side and you never got to hear his side, it would be very one-sided. It would be very good for me without maybe a lot of the questions, but you have to --

JUSTICE DALE WAINWRIGHT: That's not going to happen.

CHIEF JUSTICE WALLACE B. JEFFERSON: If we were to review the reasons. In other words, it goes back down to the trial court does a more thorough analysis and you still think the trial court got it wrong, would you be required to send us a complete record for us or the court of appeals to review the record in light of the trial court's rationale?

ATTORNEY KATHLEEN M. KENNEDY: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: So all these cases would be a full review of the trial and not of really the final judgment, but just of the basis for granting [inaudible]?

ATTORNEY KATHLEEN M. KENNEDY: In order for it to be more than just a vain act of us asking the trial judge to do something, I think it would have to be. Otherwise, I don't see the point in asking them to do it in the first place.

JUSTICE NATHAN L. HECHT: Well, one point that is that as you argued, sometimes trial judges think it's better to be either or so they won't get reversed. If there's three reasons, why not look at three reasons. But if the, if this were different and the encouragement were, no, you've got to say which one of the three it is only there's going to limited review, why wouldn't that give you more specificity even if it's wrong denying you some review on the of the validity of the reason?

ATTORNEY KATHLEEN M. KENNEDY: Even if it wasn't subject to review?

JUSTICE NATHAN L. HECHT: If you knew, if you knew what the judge, you say you want to know why the judge did it.

ATTORNEY KATHLEEN M. KENNEDY: Yes.

JUSTICE NATHAN L. HECHT: He tells you, but he still may be wrong. The court of appeals might disagree with him, but rather than find out the answer to that question whether the court of appeals is going to agree, at least you know something more, you know why he did it. Why isn't that something, why isn't that a benefit?

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ATTORNEY KATHLEEN M. KENNEDY: Because it's wrong.

JUSTICE DEBRA H. LEHRMANN: Well, I don't understand it. It seems to me that that's what you want. You're wanting to know what it is that the court felt was improper and whether it's right or not is a different issue.

ATTORNEY KATHLEEN M. KENNEDY: Right, but I think it goes hand in hand. I want to know more to know whether or not it is right and that it can be reviewed. Because if it can't be reviewed, then there's no point to giving more information because there's nothing I can do about it if it's wrong. If we go back to in the interest of fairness and justice, I don't know what it was and for the longest, it wasn't reviewable. But now that they have to give a clear and concise or specific reason if that reason is still a boiler plate vague statement, such as what I contend these three statements are, I still can't have it reviewed.

JUSTICE DEBRA H. LEHRMANN: Well, let's say if it's improper, a jury misconduct and a judge says this is because of jury misconduct. Then you know, and it doesn't really matter whether it was or wasn't jury misconduct, but you would know at that point in time that maybe you want to say something during voir dire -or you know what to do. You know, happened in that particular situation and so that's giving you something isn't it?

ATTORNEY KATHLEEN M. KENNEDY: That's a loaded question to a litigator. If that was actually in one of my orders, I think I would ask for a motion for rehearing and I would ask for clarification by the judge as to exactly what he meant by jury misconduct more of a clarification on that because it would not appear in the record, the entire court's record unless an attorney or a judge made mention of it during the course of the trial, that would be correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Ms. Kennedy. The cause is submitted and the Court will take a brief recess.

ATTORNEY KATHLEEN M. KENNEDY: Thank you very much.

MARSHAL: All rise.

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