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What's New in Early Review: Recent Developments in Mandamus and Interlocutory Appeal

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Table of Contents

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This paper highlights recent developments in early appellate review. It is an update paper and assumes that the reader is already familiar with the basic mechanisms of interlocutory appeals and mandamus. For a more comprehensive examination of interlocutory appeals and mandamus, the following two articles can be accessed on-line:

> Pamela Stanton Baron, *Interlocutory Appeals 2010*, Univ. of Texas School of Law, 20th Annual Conference on State and Federal Appeals (June 2010) (available at: http://www.tex-app.org/articles/Baron_UT2010.pdf) ("*Interlocutory Appeals 2010*").
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> Pamela Stanton Baron, *Mandamus 2010*, Univ. of Texas School of Law, 34 th Annual Page Keeton Civil Litigation Conference (Oct. 2010) (available at: http://www.texapp.org/articles/Baron_UTCivil2010.pdf) ("*Mandamus 2010*").

It has been a busy year for early appellate review. Below are some of the recent developments from the Texas Supreme Court's 2010-2011 and 2011-2012 terms.

1. Early review continues to be on the rise.

The combination of the legislative expansion of interlocutory orders that are subject to appeal and the Texas Supreme Court's expansive approach to mandamus review has resulted in unprecedented numbers of early review cases in the appellate courts. During the Court's 2010-2011 term, which ended August 31, 2011, the Court issued 112 deciding opinions. Of those, approximately 47 cases came to the Court through interlocutory appeal or mandamus. Early review cases thus represented 42% of the Court's opinion output. By far the larger portion involved interlocutory appeals, approximately 36 cases or 32% of output. Many of these cases involved healthcare expert reports or governmental immunity. The remaining 11 cases involved mandamus review, comprising 10% of the Court's output.

Courts of appeals are also seeing significant increases, especially in interlocutory appeals. *See Interlocutory Appeals 2010* at 1–2.

Mandamus Developments

2. Beyond *Columbia Medical Center*: the Court will decide in *In re United Scaffolding, Inc.* whether and how the appellate courts can review by mandamus a trial court's written reasons for granting a new trial.

The Texas Supreme Court has held that a trial court acts arbitrarily and abuses its discretion if it disregards a jury verdict and grants a new trial, but does not specifically set out its reasons. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 212–13 (Tex. 2009). The Court held that (1) stating the new trial is granted "in the interests of justice and fairness" is not a sufficiently specific reason, and (2) a relator challenging such an order does not have an adequate

remedy by appeal. *Id.* at 206, 209–10, 213.

Recently, the Court reaffirmed its *Columbia Medical Center* holding in *In re Cook*, 356 S.W.3d 493 (Tex. 2011). In *Cook*, the wife in a divorce proceeding filed a motion for a new trial. The trial court granted the motion, stating that it did so "based on all grounds in [the] motion." *Id.* Subsequently, the trial court judge resigned and a successor judge was appointed. Upon the husband's request, the successor judge reviewed the previous trial judge's judgment. And without giving specific reasons why, the successor judge issued an order stating that, after reviewing the record, it found no reason to change the previous order. Citing *Columbia Medical Center*, the Court ultimately held in a per curiam opinion that the successor trial court erred because it was required to provide "its own statement of reasons for setting aside a jury verdict." *Id.* at 495.

While *Columbia Med. Ctr.* and its progeny require trial courts to state reasons for granting a new trial, several questions remain unanswered, such as whether and how appellate courts will review those reasons once given. During its last term, the Court granted review in *In re United Scaffolding, Inc.*, No. 10-0526, and heard argument in that case on October 6, 2011. Although the Court has yet to issue a decision in this case, *United Scaffolding* is a case to watch because the Court will answer two questions left open in *Columbia Medical Center*: when a trial court grants a new trial and states its reasons, how specific do those reasons need to be and is mandamus review available to evaluate the validity of the reasons given? The parties' briefs are available on-line at: http://www.supreme.courts.state.tx.us/ebriefs/files/20100526.htm.

The underlying action is a personal injury case based on a fall from scaffolding in which the plaintiff sought $9 million in damages. The jury found the plaintiff 49% responsible and United Scaffolding 51% responsible and found damages of $178,000. The trial court granted plaintiff's motion for new trial "in the interest of fairness and justice." On first mandamus review, the Supreme Court remanded the case to the trial court to "specify its reasons for disregarding the jury verdict and ordering a new trial" as required by *Columbia Medical Center*. *In re United Scaffolding*, 301 S.W.3d 661, 662 (Tex. 2010).

On remand, the trial court issued an amended order finding certain jury findings to be against the great weight and preponderance of the evidence. The court of appeals denied mandamus review, with Justice Gaultney dissenting on the grounds that the order "states boilerplate conclusions without reasoning." *In re United Scaffolding Inc.*, 315 S.W.3d 246 (Tex. App.—Beaumont 2010).

The Court granted review. In the mandamus petition, United Scaffolding asserts that stating that a jury finding is against the great weight and preponderance of the evidence, without more, is not sufficiently specific under *Columbia Medical Center*. It asserts that non-specific, conclusory findings without explanation are nothing more than a substitution of the trial court's judgment for that of the jury. Instead, United Scaffolding argues, a trial court—like the courts of appeals when reversing on factual insufficiency—must detail all the relevant evidence and explain how it outweighs evidence supporting the verdict. The real parties assert that the courts of appeals are held to a higher standard than trial courts because the appellate courts rely solely on a cold record while the trial court has the trial experience with which to evaluate the jury's verdict.

United Scaffolding also asserts that the Court, on mandamus, should review the validity of the trial court's reasons and whether they are supported by the record. This argument is based on language in *Columbia Medical Center*, 290 S.W.3d at 212, 210 n.3, where the Court referred to

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