Petition for Writ of Mandamus Conditionally Granted and Majority and Dissenting Opinions filed December 23, 2014.

In The

Fourteenth Court of Appeals

NO. 14-14-00275-CV

IN RE WYATT FIELD SERVICE COMPANY, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
125th District Court
Harris County, Texas
Trial Court Cause No. 2011-44838

MAJORITY OPINION

This case presents our court its opportunity to address the next of the unintended consequences wrought on Texas mandamus practice due to the holding in *In Re Columbia*: exactly what is a "merits review," and how does an intermediate appellate court apply it to evaluate the "great weight and preponderance of the evidence"?

Real parties in interest, David McBride and Glenn Burns, sustained personal injuries due to an accident at a refinery owned by ExxonMobil Corporation in Baytown, Texas. Real parties sued relator, Wyatt Field Services Company, and ExxonMobil. Real parties settled with ExxonMobil prior to trial and argued that Wyatt was solely responsible for the accident. The jury returned a verdict that Wyatt was not negligent, but ExxonMobil was solely responsible for real parties' injuries. On real parties' motion, the Honorable Kyle Carter, presiding judge of the 125th District Court of Harris County, signed a new trial order in favor of real parties on March 3, 2014. The trial court's new trial order and the findings of fact reflect that the bases for granting a new trial are (1) the jury's findings that ExxonMobil was negligent and Wyatt was not were against the great weight and preponderance of the evidence; and (2) Wyatt's repeated injection of collateral source evidence into the case violated the motion in limine and tainted the jury's verdict.

Wyatt filed a petition for writ of mandamus on September 16, 2013, challenging the new trial order. We denied Wyatt's petition because it had not provided the entire trial record and, therefore, we could not ascertain whether the trial court had abused its discretion in granting a new trial. *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.).

Wyatt filed the current petition for writ of mandamus, which includes the entire trial record. Wyatt again challenges the new trial order and requests that we compel the trial court to vacate its March 3, 2014 order and render judgment on the

jury's verdict. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. We conditionally grant the petition.

I. STANDARDS OF REVIEW

A. Mandamus Review of New Trial Orders Before and after *In re Columbia*

To be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). 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 or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt. L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). "In determining whether the trial court abused its discretion with respect to resolution of factual matters, we may not substitute our judgment for that of the trial court and may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable." *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (per curiam). In other words, under an abuse of discretion standard, we defer to the trial court's factual determinations if they are supported by the evidence, but we review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

Although acknowledging that Texas trial courts have historically been afforded broad discretion in granting new trials, the Texas Supreme Court, in 2009, held that a trial court abuses its discretion by granting a motion for new trial without providing a reasonably specific explanation of the court's reasons for setting aside a jury verdict. *See In re Columbia Med. Ctr. of Las Colinas,*

Subsidiary, L.P., 290 S.W.3d 204, 210, 213 (Tex. 2009) (orig. proceeding) (holding "that discretion is not limitless"). Thus, the trial court abused its discretion by ordering a new trial based solely on "in the interest of justice" because that reason was not sufficiently specific. *Id*. at 215.

The long-established rule in Texas is that, except in very limited circumstances, an order granting a motion for new trial rendered within the trial court's plenary power is not subject to review either by direct appeal from that order or from a final judgment rendered after further proceedings in the trial court. *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984) (per curiam); *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 40 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Before *In Re Columbia*, only two such circumstances had been identified: (1) when the trial court's order was wholly void; and (2) when the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict. 290 S.W.3d at 208−09; *see also Wilkins v. Methodist Health Care Sys*., 160 S.W.3d 559, 563 (Tex. 2005).[1] The court in *Columbia* held the long-established rule, which denies aggrieved parties an adequate remedy by appeal, demonstrates why mandamus relief must be afforded in what it described

[1] In *Wilkins*, the court noted that "[e]xcept in very limited circumstances, an order granting a motion for new trial rendered within the trial court's plenary power is not reviewable on appeal." 160 S.W.3d at 563. However, new trial orders that were void or were based on the trial court's erroneous conclusion that the jury's answers to special issues were irreconcilably in conflict were subject to review on mandamus. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding); *Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial Dist. of Tex.*, 350 S.W.2d 330, 331 (Tex. 1961) (orig. proceeding).

as "exceptional circumstances"—the protection of the right to a jury trial.[2] 290 S.W.3d at 210.

Subsequently, the Texas Supreme Court articulated a two-prong test for determining whether a trial court abused its discretion in granting a new trial. *See In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding). 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. *Id*. at 688–89.

More recently, the supreme court held that an appellate court may conduct a "merits review" of the correctness of a new trial order setting aside a jury verdict that facially comports with *Columbia* and *United Scaffolding*. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 757−59 (Tex. 2013) (orig. proceeding).[3] Specifically, the court explained that, if, despite conformity with the procedural requirements of its precedent, a trial court's articulated reasons are not "actually true," the new trial order may be an abuse of discretion. *Id*. at 758. Thus, it is

[2] It is unclear whether the "exceptional circumstances" extend to all jury trials or only to those where a second trial would involve undue "time, trouble and expense." The court did not expressly balance the benefits of mandamus against the detriments. *See Columbia*, 290 S.W.3d at 209−10; *see also In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (explaining that the adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments).

[3] The high court did not indicate the circumstances under which an intermediate appellate court may decline to conduct such a review.

well-settled that merits-based review of new trial orders granted following a jury trial are now available to litigants. *See, e.g.*, *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 602 (Tex. 2014) (orig. proceeding) (per curiam) (noting that the court had previously held in *Toyota* that appellate courts may conduct a merits-based review of the trial court's articulated reasons for granting a new trial); *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598 (Tex. 2014) (orig. proceeding) (per curiam) (same).

B. Against the Great Weight and Preponderance of the Evidence

Ironically, although the high court has directed trial courts to articulate a **well-defined legal standard** as one indicia that its new trial order is legally appropriate, *see United Scaffolding*, 377 S.W.3d at 685, it has enunciated a new standard of review for intermediate appellate courts to use in implementing its directive: the "merits-based review." *See Toyota Motor Sales*, 407 S.W.3d at 757; *see generally* W. Wendall Hall, *Standards of Review in Texas*, 42 ST. MARY'S L.J. 3 (2010). It provided little guidance to review the trial court's ruling where, as here, one reason given by the trial court for granting a new trial is that the evidence is against the great weight and preponderance of the evidence.[4]

[4] The panel granted oral argument on the specific issue of what standard of review applies to this case. We asked the parties to address the following at oral argument:

1. Is the standard of review any different from when a trial judge grants a new trial on the basis that the verdict was against the great weight and preponderance of the evidence versus when the appellate court does? If so, explain the difference in the articulated standard.

2. Do we have to conduct a harm analysis as to the collateral source violations?

In a factual sufficiency review, an appellate court considers and weighs all the evidence, both supporting and contradicting the finding. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406−07 (Tex. 1998). When a party attacks the factual sufficiency of an adverse finding on an issue on which it had the burden of proof, the party must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). A reviewing court considers all the evidence and will set aside the judgment only if it is so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). The fact finder is the sole judge of the credibility of the witnesses and the weight given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). When presented with conflicting testimony, the fact finder may believe one witness and disbelieve others, and it may resolve inconsistencies in the testimony of any witness. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). The reviewing court "must not merely substitute its judgment for that of the jury." *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

After *Toyota,* the Texarkana Court of Appeals addressed an order granting a new trial on the ground that the jury's finding in favor of the defendants was

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3. Should the new trial order or the judge's findings of fact control in the event of any discrepancy?

4. What weight do we give the trial judge's findings versus the jury's findings?

5. Assuming the interest of justice alone is insufficient to grant a new trial, how do we incorporate that finding by the trial judge?

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 the 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 if the evidence was such that reasonable minds could differ on the meaning of the evidence or inferences and conclusions drawn therefrom. *Id.* at 402−04. The court, therefore, concluded that "the grant of the new trial improperly intruded on the jury's province," and the trial should have rendered judgment on the verdict. *Id.* at 404; *see also In re Zimmer, Inc.*, No. 05-14-00940-CV, — S.W.3d —, 2014 WL 6613043, at *8 (Tex. App.—Dallas Nov. 21, 2014, orig. proceeding) (stating that "we see no reason to believe the standards for factual sufficiency review in new trial mandamus proceedings should differ from the standards of review on appeal," and holding, after a cumbersome review of the forty-one-volume record, that the trial court incorrectly substituted its credibility decisions for those of the jury and weighed the evidence differently than the jury weighed the evidence).[5]

[5] The First Court of Appeals addressed a new trial order, which granted a new trial based in part on the trial court's determination that the jury's finding that the insurance company did not breach the homeowner's policy was contrary to great weight and preponderance of the evidence. *See In re United Servs. Auto. Ass'n*, No. 01-13-00508-CV, — S.W.3d —, 2014 WL 4109756, at *5 (Tex. App.—Houston [1st Dist.] Aug. 21, 2014, orig. proceeding [mand. filed]). The court stated that it must review "all the evidence in a light favorable to the verdict and must assume that the jurors resolved all conflicts in the evidence in accordance with the verdict." *Id.* at *7 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005)). The appellate court

Real parties take the position that, in conducting the traditional factual sufficiency review, the appellate courts will not give any deference to the trial court's "significant discretion" in granting new trials. Instead, according to real parties, the appellate courts will essentially be performing their own de novo factual sufficiency review of the cold record to reach a different conclusion.

The Texas Supreme Court acknowledged that "appellate courts benefit from the hindsight that a complete record provides. Trial courts, on the other hand, must make difficult, often dispositive, decisions based on their recollection and best judgment alone, frequently without the aid of full records, transcripts, or briefing." *Toyota Motor Sales*, 407 S.W.3d at 761. However, the court also made clear that the trial court's stated reasons for granting a new trial must be supported by record. *See id.* at 759 ("Having concluded that the reasons articulated in a trial order are reviewable on the merits by mandamus, we now evaluate the trial court's grant of new trial against the underlying record."). Moreover, while the court has not retreated from its position that trial courts have significant discretion in granting new trials, "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." *Columbia*, 290 S.W.3d at 212.

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found that the trial court abused its discretion by granting a new trial on this ground. We note that, in citing to *City of Keller*, the court articulated the standard for reviewing the legal sufficiency of the evidence. *See Augusta Barge Co. v. Five B's, Inc.*, No. 01-13-00092-CV, 2014 WL 4219449, at *3 (Tex. App.—Houston [1st Dist.] Aug. 26, 2014, no. pet. h.) (mem. op.) ("In conducting a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it."); *see also Wells v. Johnson*, 443 S.W.3d 479, 493(Tex. App.—Amarillo 2014, pet. filed) (explaining that, in conducting a factual sufficiency review, the court of appeals does not consider the evidence in the light most favorable to the finding).

The position advocated by real parties would leave the courts of appeals with no ability to review new trial orders based on factual insufficiency. We do not believe this is the result intended by the Texas Supreme Court in providing for mandamus review of new trial orders. In a mandamus proceeding, we may not substitute our judgment for that of the trial court. *Sanders*, 153 S.W.3d at 56. But neither may the trial court substitute its judgment for that of the jury in granting a new trial. *Columbia*, 290 S.W.3d at 212. The method for ensuring that the trial court does not substitute its judgment for that of the jury, is to confirm that the court's reasons for granting a new trial are valid and correct, i.e., supported by the trial record. *See Toyota Motor Sales*, 407 S.W.3d at 758 ("If . . . a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand."). Thus, using a factual sufficiency standard, we will engage in a review of the entire trial record to determine whether it supports the trial court's reasons for granting a new trial. If the record does not support the trial court's stated reasons, then the trial court will have abused its discretion in granting a new trial. *See id.* at 761 (holding the trial court abused its discretion by granting a new trial because the record did not support the articulated reason).

II. BACKGROUND

ExxonMobil processes crude oil at its refinery to turn it into gasoline. A by-product of that process is tar. A "flexicoker" unit at the refinery breaks down the tar into pure carbon at 1300 degrees. The carbon, which is like sand, is called "coke." The coke is "heated up and sent back to the reactor" as the source of heat for the reactor.

ExxonMobil performs a "turnaround" on the flexicoker unit about every two to three years, during which maintenance is performed on the unit. It takes about two years to plan the turnaround, and the unit has to be shut down for the maintenance work to be performed. As part of the turnaround process, the heater of the flexicoker unit, which is about 1300 degrees, must be cooled down in order for the maintenance work to be performed. Water and steam are sprayed from nozzles to cool down the heater. Because coke builds ups in the spray nozzles and clogs them, ExxonMobil designed the system so that, during the time between the turnarounds, the spray nozzles were replaced with "dummy nozzles." The only function of the dummy nozzles was to act as "placeholders" for the spray nozzles.

To remove the dummy nozzle, a worker would pull the nozzle out a certain distance, but not so far as to pull it out of the heater. An ExxonMobil employee would shut the gate valve, which acted as a barrier to keep the steam and coke from coming out. The dummy nozzle could then be pulled out all the way out. A safety chain was installed on the nozzle. When installed properly, the safety chain only allowed the dummy nozzle to be pulled out a certain distance so that the nozzle was not pulled out too far before the gate valve was closed and thereby letting steam and water escape.

On July 3, 2011, McBride and Burns, as LWL, Inc. employees, were assigned to remove the dummy nozzles. They were pulling out a dummy nozzle, when it came out too far, the gate valve was not shut, and steam and coke spewed out of the heater. McBride and Burns were thrown, and stem and coke were sprayed on them, causing burns and other injuries.

Subsequent to the accident, ExxonMobil performed a root cause analysis and determined that the safety chain had been "anchored to the wrong location allowing the nozzle to be detached completely out of its packing before the chain stopped." ExxonMobil also determined that Wyatt had put the dummy nozzles back in place and reattached the safety chain in the previous turnaround in 2008.

McBride and Burns sued Wyatt for negligence, negligence per se, and gross negligence for improperly installing a safety chain. They also sued ExxonMobil, which settled the case before trial.

The case went to trial on January 30, 2013. Wyatt did not dispute that the safety chain was installed in an incorrect location, the condition was unreasonably dangerous, or real parties were not warned of the incorrect installation. Wyatt, however, disputed that it was the contractor that put the dummy nozzles back in place and reattached the safety chains in 2008. Real parties argued to the jury that Wyatt was solely liable, ExxonMobil was not liable because it had no actual knowledge that the safety chains were in an incorrect location, and LWL bore no responsibility for the accident.

On February 13, 2013, the jury reached a verdict, finding that (1) Wyatt was not negligent; (2) LWL was not negligent; (3) ExxonMobil exercised or retained some control over the manner in which the work in question was performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and (4) ExxonMobil's negligence with respect to the condition of the dummy nozzle system proximately caused the occurrence. Although the jury found damages for McBride ($902,681.41) and Burns ($2,905,898.95), neither

would recover because of the jury's no-negligence finding as to Wyatt and ExxonMobil's settlement prior to trial.

III. REAL PARTIES' MOTION FOR NEW TRIAL & COURT'S ORDER

Real parties filed a motion for new trial, arguing (1) the jury's findings that Wyatt was not negligent and the accident was caused by Exxon's negligence were contrary to the great weight and preponderance of the evidence; and (2) Wyatt's injection of collateral sources into the evidence tainted the verdict.

On March 4, 2013, the trial court held a hearing on real parties' motion for new trial and ordered a new trial as follows:

> The Court has considered Plaintiffs' motion for a new trial, all responsive briefing, the arguments of counsel, and the Court's own observations during the trial of this case. The Court believes Plaintiffs' motion is meritorious and should be granted.
>
> The jury's answer to Question 1(a) was contrary to the overwhelming weight of the evidence. The great and overwhelming preponderance of the evidence showed that the safety chain at issue in this case was installed in an incorrect location. The great weight and overwhelming preponderance of the evidence also showed that the incorrect location of the safety chain created an unreasonably dangerous condition. The great weight and overwhelming preponderance of the evidence introduced at trial confirmed that Defendant Wyatt Field Services Company installed the safety chain in 2008 and that the chain remained in the same location until July 3, 2011. Further, the great weight and overwhelming preponderance of evidence introduced at trial confirmed that Plaintiffs were never warned that the safety chain was incorrectly installed and had no reason to be aware of the danger. The interests of justice require a new trial.

> A new trial is also required because Defendant and its witnesses regularly injected evidence of collateral sources into the case in violation of the Court's order granting Plaintiff's [sic] motion in limine on this topic. This inadmissible evidence tainted the jury's verdict. Good cause and the interests of justice require the Court to grant a new trial.

On April 9, 2013, the trial court entered the following findings of fact in support of its new trial order, addressing ExxonMobil's actual knowledge, in addition to the prior grounds expressed in its order March 4, 2013 order:

1. The jury's finding that Defendant Wyatt Field Services Company was not negligent is against the great weight and preponderance of the evidence.

2. The jury's finding that Defendant Wyatt Field Services Company was not negligent renders the jury's verdict manifestly unjust.

3. The jury's finding that ExxonMobil had actual knowledge of any unreasonable risk of harm/condition is not supported by factually sufficient evidence.

4. The jury's finding that ExxonMobil had actual knowledge of any unreasonable risk of harm/condition renders the jury's verdict manifestly unjust.

5. Based on the combination of factually insufficient liability findings concerning Defendant Wyatt Field Services Company and ExxonMobil, the Court finds that the jury failed to follow the Court's instructions and simply decided to place all responsibility on ExxonMobil without regard to the legal standards set forth in the Court's charge.

6. Defendant Wyatt Field Services Company repeatedly violated the Court's order granting Plaintiff's motion in limine.

7. Defendant Wyatt Field Services Company ignored this Court's admonishments about the motion in limine.

8. Defendant Wyatt Field Services Company's repeated injection of information into this case that was inadmissible, including but not limited to information regarding benefits available to Plaintiff from collateral sources, tainted the verdict and rendered it manifestly unjust.

The trial court also entered the following conclusions of law:

1. The Court concludes that it is entitled to grant a new trial when it finds the jury verdict is contrary to the great weight or is not supported by factually sufficient evidence.

2. The Court concludes that it is entitled to grant a new trial when it finds that the injection of inflammatory collateral matters (such as collateral sources) poisons the verdict.

3. The Court concludes that it is entitled to grant a new trial when it is required in the interest of justice.

This mandamus followed. Wyatt claims the trial court abused its discretion in granting real parties' motion for new trial because (1) the jury's finding that Wyatt was not negligent was not against the great weight and preponderance of the evidence; (2) the jury's finding that ExxonMobil had actual knowledge of the condition that caused the injuries was immaterial and could have no impact on the verdict after the jury had found Wyatt was not negligent; (3) any violations of the motion in limine on collateral sources made no mention of any fact bearing on Wyatt's liability; and (4) the Texas Supreme Court has disapproved of granting a new trial based on the "interests of justice."

The new trial was granted following a very long and very expensive jury trial. We find that this case presents the "exceptional circumstances" found in *Columbia* to warrant mandamus review. *See* 290 S.W.3d at 208−210.

The trial court's new trial order and the findings of fact reflect that the bases for granting a new trial are (1) the jury's findings that ExxonMobil was negligent and Wyatt was not were against the great weight and preponderance of the evidence; and (2) Wyatt's repeated injection of collateral source evidence into the case violated the motion in limine order and tainted the jury's verdict. We hold that these are reasonably specific reasons facially comporting "with *Columbia's* procedural 'form' requirements." *See Toyota Motor Sales*, 407 S.W.3d at 759 (comparing new trial order in that case with new trial order at issue in *Columbia*, which merely asserted "in the interest of justice" as the basis for granting a new trial). The stated reasons for granting the new trial here—the jury's verdict is against the great weight and preponderance of the evidence and evidence injected into the record in violation of a limine order tainted the verdict—are also legally appropriate and satisfy *United Scaffolding*. *See In re United Servs. Auto Ass'n,* 2014 WL 4109756, at *7 (holding "against the great weight and preponderance of the evidence" is a legally appropriate basis for granting a new trial); *In re City of Houston*, 418 S.W.3d 388, 393 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (holding that the order granting a new trial on violations of a limine order, among other bases, satisfied *United Scaffolding* standard).

Having determined that the new trial order facially complies with the requirements articulated in *Columbia* and *United Scaffolding*, we must determine whether the trial court's stated reasons for granting a new trial are valid and correct

by conducting a careful "merits review" of the record. *See Toyota Motor Sales*, 407 S.W.3d at 759 ("Simply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct.").

IV. JURY'S NO-LIABILITY FINDING AS TO WYATT

In its first issue, Wyatt claims that the trial court's finding that the jury's verdict as to Wyatt's negligence was against the great weight and preponderance of the evidence is not supported by the record. The trial court set forth the following in support of its finding: (1) the safety chain was installed in an incorrect location; (2) the incorrect location of the safety chain created an unreasonably dangerous condition; (3) Wyatt installed the safety chain in 2008, and it remained in the same location until July 3, 2011; and (4) real parties were never warned that the safety chain was incorrectly installed and had no reason to be aware of the danger.

Wyatt did not dispute at trial that the safety chain was installed in an incorrect location, the condition was unreasonably dangerous, or that real parties were not warned of the incorrect installation. Instead, Wyatt only disputed that it installed the safety chain in 2008, and that the chain remained in the same location until July 3, 2011.

Robert Merryman, who was recently retired, had worked as a turnaround planner for ExxonMobil since 1990. Merryman testified that the 2008 turnaround involved about 20,000 activities. ExxonMobil kept track of the activities and the schedule with a computer program known as "Primavera." The Primavera printout for the 2008 turnaround showed that Wyatt reinstalled the dummy nozzles and reconnected the safety chains. Merryman saw no documents suggesting that any contractor other than Wyatt installed the safety chain. Merryman also testified

that, if another contractor had replaced the dummy nozzles and safety chains, then such contractor would have wanted credit and compensation for the work.

Peter Howell, plaintiff's expert in refineries and process safety, testified that, based on the documents and Primavera, Wyatt was assigned the job of reinstalling the dummy nozzles and connecting safety chains to the nozzles. Furthermore, Howell testified about Plaintiff's Exhibit 22, an email chain regarding which contractor replaced the dummy nozzles and reattached the safety chains. Tim McCarthy, refinery manager for the fuels department, which included the flexicoker unit, led ExxonMobil's root cause investigation. McCarthy sent an email, on August 3, 2011, to Tommy Stanley, a turnaround manager, asking who had performed the dummy nozzle installation in the 2008 turnaround; Stanley replied that Wyatt had performed the work in 2008. Howell testified that he did not see any documents showing that Wyatt did not do the work; instead, all the documents he reviewed showed that Wyatt had done the work. Howell further testified that ExxonMobil hired Wyatt to the do the quality control, which means that Wyatt was to make sure all the work had "been done per the drawings." Howell stated that either Wyatt did not perform the quality control or it did not do it properly.

Wyatt's expert, Russ Elveston, who worked as an OSHA safety compliance officer for almost thirty years, stated on cross-examination that Wyatt was assigned the job of putting in the safety chains and "more likely than not that Wyatt did it." Elveston further explained that "[i]t showed up on at least one or two documents that indicated that [Wyatt] would be assigned it." Elveston noted that the documents showing Wyatt did the work all stem from the Primavera entry.

However, Elveston limited his response that Wyatt performed the work: "To say with one hundred percent certainty that they did it, I won't do it."

Wyatt's corporate representative, James Jordan, testified regarding whether Wyatt performed the work. Jordan stated that "[w]e have nothing yet that actually confirms" that Wyatt installed the chain in 2008, even though Jordan had gone through Wyatt's documents trying to find information that would confirm that Wyatt did the work. Jordan stated that the documents showing that Wyatt did the work are "all based on that Primavera." With regard to Primavera, Jordan testified that "[o]n face value, that document says that Wyatt — it was Wyatt's work." However, Jordan said "there should be more documents out there that indicate when it was done, who did it, and have all the sign-offs accordingly." Jordan admitted that he had seen not seen any documents showing that Wyatt had been pulled off the job of installing the chains. Jordan testified that ExxonMobil did the quality control on Wyatt's work in 2008.

There was also evidence that the dummy nozzle and chain had not been changed or worked on since the 2008 turnaround. Howell explained that a work order would be required for any work to have been performed on the dummy nozzles. ExxonMobil provided Howell with a list of all work orders for the flexicoker unit for the period between 2008 and July 3, 2011. None of the work orders showed that there was any work performed on the dummy nozzles.

Jordan also testified that he did not have any documents showing that the chain had been moved between 2008 and July 3, 2011. Elveston explained that, if it had just been a single nozzle, there would be a possibility that the chain had been changed. Elveston further stated that "[s]ince all of them were set up the same way

and there was no evidence that any changes had been made, although, again, you cannot rely on two and a half years. You're not absolutely sure that something didn't happen."

Real parties argue there was undisputed proof that no one was likely to go near the safety chains without a reason and specific authorization. Howell testified that the dummy nozzles are located on platform forty feet above the ground, next to the heater, which reaches a temperature of 1300 degrees. McBride and Burns participated in an hour-long general safety meeting and a "toolbox meeting" to discuss what they were going to and how they were going to do it. They also did a walk-through with their LWL supervisor. An air-conditioning vent was set to blow on them. McBride stated that they were going to work in twenty-minute shifts because of the heat. They wore fire retardant clothing, vests with ice packs, aluminized suits, which are four inches thick, "boots that go over our boots," jackets, gloves, and helmets. In other words, any alleged subsequent work on the dummy nozzles and chain would require planning.

Wyatt argues that despite the findings that it had installed the safety chain in 2008, and that the chain remained in the same location until July 3, 2011, the grounds stated by the trial court do not necessarily lead to the conclusion that Wyatt was negligent. Wyatt asserts that the jury was presented with evidence of the deficiency of the ExxonMobil's engineering drawings, which could have led the jury to determine that Wyatt was not negligent. Wyatt was to have received engineering drawings in connection with the work on the dummy nozzles. Elveston testified that ExxonMobil's engineer drawing "is less than ideal. Going strictly by the drawing and what we saw out there is not really representative of

what was out there." Elveston further stated "The drawing . . . does not have some of the elements that I would expect to see on it."

Elveston also testified that "the diagram with the little bubble that says the chain is supposed to be attached here" that was on the engineering drawing was not a warning. There was no procedure describing the purpose of chain, which was referred to as the "blow out" chain in the documents. He explained that there was "no mention of safety, warning any type of caution, make sure it's done this way, there is no procedure going. . . . A drawing is a nice reference but without a written procedure and going through it step by step to make sure and including all the hazards that's going to be there and all the precautions necessary it's just not — it just doesn't meet the requirements to the standard." Elveston concluded that "you have the procedures to tell you how to put stuff in the right place."

Howell stated in his report that the design of the dummy nozzle system was inadequate. Howell's testimony at trial differed: "The design could have been better than what it was and it could have been designed so that this incident would not have occurred, but the design that they had was adequate." Howell testified to the lack of written procedures for the system.

Howell testified that Wyatt was provided with a drawing that "showed exactly where it's supposed to be attached," but the drawing is not a "written procedure." Howell explained that there were no written procedures for safely removing and installing dummy nozzles and he believed that ExxonMobil should have had such written procedures. According to Howell, without written procedures, it is difficult to ensure that the contractors' workers are properly trained, including for the task of reinstalling the dummy nozzles. These

procedures can reduce human error such as attaching the safety chain in the wrong place, and, if there had been a written procedure for attaching the chain in the correct location, along with a reference to the drawing, "[i]t would have reduced the probability of this incident."

Howell also explained that, if the ExxonMobil employees, who were present before and during the removal of the dummy nozzle, had been properly trained, they would have seen that the safety chain was not properly installed and could have stopped the job until the chain had been correctly installed. According to Howell, ExxonMobil has the responsibility to train employees to perform specific jobs such as installing or withdrawing the dummy nozzle.

Howell further testified that ExxonMobil performed an inadequate job hazards analysis concerning the dummy nozzles. ExxonMobil did not consider a blowout when the dummy nozzle was retracted, which would expose workers to high temperature hydrocarbons and poisonous hydrogen sulfide.

We have reviewed all the evidence, both that which supports and contradicts the jury's finding that Wyatt was not negligent. *See Maritime Overseas Corp.*, 971 S.W.2d at 406−07. The evidence regarding whether Wyatt performed the installation of the safety chains in 2008 was disputed at trial. The jury could have found Jordan's testimony that he found nothing in Wyatt's files to confirm that Wyatt had done the work was more credible than the testimony based on a single computer entry showing that Wyatt had done the work. *See Golden Eagle Archery, Inc.*, 116 S.W.3d at 761; *McGalliard*, 722 S.W.2d at 697. The reason for the improper installation was also disputed. The jury could have given more weight to testimony that ExxonMobil's design of the dummy nozzle system was

not adequate and that this accident might not have happened if ExxonMobil had had written procedures concerning the proper installation of the safety chain. Given the presence of conflicting evidence and the jury's apparent resolution of credibility of witnesses and giving greater weight to evidence favoring Wyatt, the jury's finding that Wyatt was not negligent is not against the great weight and preponderance of the evidence. Thus, we hold that the trial court abused its discretion by finding that the jury's answer that Wyatt was not negligent is against the great weight and preponderance of the evidence. *See Columbia*, 290 S.W.3d at 212 (explaining that the trial court may not substitute its judgment for that of the jury when it grants a new trial). We sustain Wyatt's first issue.

V. JURY'S LIABILITY FINDING AS TO EXXONMOBIL

In its second issue, Wyatt contends that the trial court abused its discretion by granting real parties a new trial based on its finding that there was no evidence that ExxonMobil had actual knowledge of the condition that caused real parties' injuries. Wyatt primarily argues that any error by the jury in finding ExxonMobil liable could have no effect on the verdict after the no-liability finding as to Wyatt and, therefore, was harmless.

A jury question is immaterial when it should not have been submitted, or when it was properly submitted but has been rendered immaterial by other findings. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994). A jury question is also immaterial when its answer can be found elsewhere in the

verdict or when its answer cannot alter the effect of the verdict.[6] *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995).

As addressed above, we have concluded that granting a new trial based on the jury's no-liability finding as to Wyatt was against the great weight and preponderance of the evidence is not a valid reason because it is not supported by the record. Real parties settled with ExxonMobil prior to trial and will not recover any damages from ExxonMobil as a result of any verdict against it. Thus, the jury's no-liability finding in favor of Wyatt renders any liability finding against ExxonMobil immaterial. *Cf. Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 635 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("A zero award presents no reversible error when the jury finds on sufficient evidence that defendant committed no negligent act, because even if damages were awarded, the trial court would still be required to enter the take-nothing judgment it did enter."). We sustain Wyatt's second issue.

VI. MOTION IN LIMINE

In its third issue, Wyatt claims the trial court abused its discretion by granting real parties' motion for new trial based on violations of the court's limine order prohibiting the introduction of collateral source evidence without first approaching the bench for a ruling.

[6] Real parties assert that the jury's answer on Wyatt's liability is not the only relevant finding at issue. According to real parties, Texas Rule of Civil Procedure 320 does not require trial courts to consider each jury answer in a vacuum. "When it appears that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only." Tex. R. Civ. P. 320. Without explanation, real parties contend that the trial court cannot grant a separate trial as to only a part of this case.

There were two occasions in which collateral source evidence was brought up in front of the jury. Both instances involved Wyatt's attorney questioning Robert Cox, Wyatt's vocational rehabilitation expert, on direct examination. The following took place in the first incident:

> Q. Okay. And to the extent that and this seems like a silly question. If you basically — If I tell you he can't lift anything. He can't look up, he can't climb, he can't turn his head and psychologically he can't join the workforce, I mean, do you have any options for vocational rehabilitation?
>
> A. No, ma'am.
>
> Q. Okay.
>
> A. If a person has those sorts of limitations then I would try to get them signed up for Social Security for disability.
>
> MR. J. ITKIN: Objection, your Honor.
>
> MR. C. ITKIN: Your Honor, can we approach, please?

The trial court then conducted a bench conference outside the hearing of the jury. Real parties' counsel did not request an instruction to disregard, but suggested that Cox be admonished when the court took a break.

Wyatt's attorney then resumed direct examination of Cox, and the following testimony came out:

> Q. Okay. And you — do you sometimes recommend some additional training for folks to get into a position where they have other job opportunities available?
>
> A. Yes. Short term, on-the-job training.

> Q. Okay. Could be even, I mean, it could be a long time but if you have training for three, four, five, six months, does that open up more opportunities to you?
>
> A. Not to me but to the person who is trying to get re-employment, yes, ma'am.
>
> Q. Fair enough.
>
> A. If I may say to be sure that everyone understands these are services that are available throughout Texas, through the Department of —
>
> MR. ITKIN: Your Honor —

The trial court then announced that they were going to take a break. While the jury was out of the courtroom, the trial court instructed Cox not to testify about government assistance or any other collateral source for compensation. Real parties' counsel suggested including an instruction in the jury charge not to consider collateral source evidence rather than giving an instruction to disregard when the jury returned to the courtroom because that would have called more attention to Cox's testimony. The trial court stated that it was granting real parties' request for jury charge instruction.

Later, at the charge conference, real parties' counsel reminded the trial court that "[w]e had the issue of collateral benefits. I think we agreed between the party [sic] to put an instruction in." Wyatt objected to the inclusion of such an instruction in the charge, and real parties then stated they could take up the issue post-trial.

Wyatt argues that the testimony makes no mention of any fact that could possibly bear on Wyatt's liability, and the jury's damages findings are immaterial

in light of the no-liability finding in favor of Wyatt. The purpose of a motion in limine is to prevent the other party from asking prejudicial questions and introducing evidence in front of the jury without first asking the court's permission. *Weidner v. Sanchez*, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A motion in limine preserves nothing for review. *In re R.V., Jr.*, 977 S.W.2d 777, 780 (Tex. App.—Fort Worth 1998, no pet.). The complaining party must immediately object and also request the trial court to instruct the jury to disregard the evidence. *State Bar of Tex. v. Evans*, 774 S.W.2d 656, 658 n.6 (Tex. 1989) (per curiam); *Weidner*, 14 S.W.3d at 363.

When evidence is placed before the jury in violation of a motion in limine, an instruction to disregard is generally sufficient to cure error. *Barnes v. Univ. Fed. Credit Union*, No. 03-10-00147-CV, 2013 WL 1748788, at *12 (Tex. App.—Austin Apr. 18, 2013, no pet.) (mem. op.). Violations of an order on a motion in limine are incurable if instructions to the jury would not eliminate the danger of prejudice. *Onstad v. Wright*, 54 S.W.3d 799, 805 (Tex. App.—Texarkana 2001, pet. denied) (citing *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962)).

Generally, the failure to request the court to instruct the jury to disregard the testimony results in waiver of the alleged error where the instruction would have cured the error. *In re B.W.*, 99 S.W.3d 757, 760 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In that situation, the reviewing court determines whether an instruction to disregard would not have cured the error. *Barnes*, 2013 WL 1748788, at *12; *Weeks Marine, Inc. v. Barrera*, No. 04-08-00681-CV, 2010 WL 307878, at *6 (Tex. App.—San Antonio Jan. 27, 2010, pet. denied) (mem. op.).

When a trial court instructs the jury to disregard evidence offered in violation of a motion in limine, the reviewing court may review the evidence to determine whether an instruction to disregard was adequate to cure its admission. *In re City of Houston*, 418 S.W.3d at 397 (citing *Dyer v. Cotton*, 333 S.W.3d 703, 715 (Tex. App.—Houston [1st Dist.] 2010, no pet.)). A new trial may be justified if the impact of the improper testimony was incurable by the trial court's instructions. *Id.* (citing *Dove v. Dir., State Emps. Workers' Comp. Div.*, 857 S.W.2d 577, 580 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

In *City of Houston*, the court of appeals found that the trial court abused its discretion by granting a motion for new trial for the plaintiffs for the violation of a limine order. *Id.* The plaintiffs sued the City after a police vehicle hit the plaintiffs' vehicle while responding to the report of a suspected drunk driver. *Id.* at 391. The jury found that the City bore 60 percent of the responsibility and the driver of the other vehicle bore the remaining responsibility. *Id.* The jury also found that the officer was performing a discretionary duty, in good faith, and within the scope of his authority, establishing one of the City's affirmative defenses and relieving it of liability. *Id.* The trial court granted the plaintiffs' motions for new trial—one of the grounds being violations of the motion in limine prohibiting any mention of the issuance of the citation to the driver. *Id.* at 391−92, 397. The officer, however, mentioned the citation in his testimony. *Id.* at 397. The trial court promptly sustained the objection by the driver's counsel, granted a motion to strike the testimony, and instructed the jury to disregard the testimony about the citation. *Id.*

On mandamus review of the new trial order, the court reviewed the evidence to determine whether the instruction to disregard was adequate to cure the admission of the prohibited evidence. *Id.* The court held that there was no reason to conclude that the instruction actually failed to cure the effect of the improper testimony. *Id.* The issuance of a citation was relevant only to the issue of who bore responsibility for causing the accident, and the jury found the City bore the greatest responsibility for the accident despite having heard that the plaintiff had received a citation. *Id.* Because the improper testimony had nothing to with the affirmative defense of "discretionary duty," on which the City prevailed, the testimony was ultimately harmless, even if it had not been disregarded by the jury. *Id.*

The court in *City of Houston* applied the standard for reviewing the violation of a motion in limine when an instruction to disregard was given. *See id.* ("When a trial court instructs the jury to disregard evidence offered in violation of a motion in limine, we may review that evidence to determine whether an instruction to disregard was adequate to cure its admission."). Here, the record shows that no instruction was given either at the time of the objection or in the jury charge; therefore, we consider the evidence to determine whether an instruction would have cured the violations. However, as addressed below, the admission of Cox's testimony in violation of the limine order was harmless, regardless of whether an instruction would or would not have cured the violations.

The collateral source rule is both a rule of evidence and damages. *Taylor v. Am. Fabritech, Inc.*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The collateral source rule precludes any reduction in a tortfeasor's

liability because of benefits received by the plaintiff from someone else. *Haygood v. De Escabedo*, 356 S.W.3d 390, 394 (Tex. 2011). In other words, the defendant is not entitled to present evidence of, or obtain an offset for, funds received by the plaintiff from a collateral source. *Taylor*, 132 S.W.3d at 626. The jury's damages findings are not relevant in light of the jury's no-negligence finding as to Wyatt. Consequently, Wyatt's violation of the trial court' limine order could not have affected the jury's finding that Wyatt was not negligent, and any violation was harmless. *See City of Houston*, 418 S.W.3d at 397 ("[A] harmless error cannot constitute 'good cause' for granting a new trial."). We sustain Wyatt's third issue.

VII. "IN THE INTEREST OF JUSTICE"

In its fourth issue, Wyatt contends that the trial court abused its discretion by granting the new trial "in the interest of justice." Wyatt raised this issue in its first petition for writ of mandamus, and we held that the trial court abused its discretion by including "in the interest of justice" as a ground for granting a new trial because it is no longer an independently sufficiently specific reason for granting a new trial. *Wyatt Field Serv. Co.*, 2013 WL 6506749, at *3 (citing *United Scaffolding*, 377 S.W.3d at 689−90; *Columbia*, 290 S.W.3d at 215). We reiterate our previous holding. Having held that the trial court's other three reasons for granting a new trial, i.e., the jury's findings that Wyatt was not negligent and ExxonMobil was negligent and the introduction of collateral source evidence tainted the jury's verdict, are not valid and correct reasons, the sole remaining basis for granting the new trial is "in the interest of justice." Again, because this is not an independently sufficiently specific reason for granting a new trial, the trial court abused its discretion by granting a new trial on this ground. *See United Scaffolding*, 377

S.W.3d at 689−90 (stating "in the interest of justice" is never an independently sufficient reason for granting a new trial); *Columbia*, 290 S.W.3d ("Broad statements such as 'in the interest of justice' are not sufficiently specific."). We sustain Wyatt's fourth issue.

VIII. CONCLUSION

Having sustained all of Wyatt's issues, we conclude that the trial court abused its discretion by granting real parties' motion for new trial and Wyatt has no adequate remedy by appeal. Therefore, we conditionally grant Wyatt's petition for writ of mandamus and order the trial court to (1) vacate its March 4, 2013 order granting real parties' motion for new trial; and (2) render judgment on the jury's verdict. The writ will only issue if the trial court does not act in accordance with this opinion.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Christopher, Jamison, and McCally. (McCally, J., dissenting).

Petition for Writ of Mandamus Conditionally Granted and Majority and Dissenting Opinions filed December 23, 2014.

In The

Fourteenth Court of Appeals

NO. 14-14-00275-CV

IN RE WYATT FIELD SERVICE COMPANY, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
125th District Court
Harris County, Texas
Trial Court Cause No. 2011-44838

D I S S E N T I N G O P I N I O N

The Majority concludes that the unintended consequence of *In re Columbia* and its progeny, including *In re Toyota*, is that an appellate court must apply a factual-sufficiency review of the trial court's factual insufficiency decision—viewing the evidence in the light most favorable to the jury findings. Applying that mandamus factual-sufficiency standard equals reversal, as a matter of law, in every case. Thus, the consequence of the Majority's opinion, intended or

unintended, is that a trial court may not grant a motion for new trial on factual insufficiency. Because I disagree that a traditional factual sufficiency standard applies to the mandamus review of the trial court's grant of new trial, I respectfully dissent.

I. INTRODUCTION

Our system of justice demands that we show respect for both the role of the jury to determine disputed questions of fact and the role of the trial judge to apply the law to those fact findings and to ensure that all parties *received* a fair trial. A trial judge may not substitute its judgment for the jury on factual disputes following a trial any more than a trial judge may resolve genuine issues of material fact on summary judgment. However, as part of the trial court's oversight role, the trial judge may grant a motion for new trial on factual insufficiency, subject to a merits-based mandamus review of that decision by the court of appeals.

As a question of first impression in this court, the Majority decides the standard by which this court of appeals performs such a merits-based mandamus review. Instead of the traditional mandamus standard, abuse of discretion, the Majority adopts a factual-sufficiency review, not only affording no discretion to the trial court's decision but also affording full deference to the jury's presumed determination of credibility. The Texas Supreme Court has not articulated the standard we should apply; however, in repeatedly reaffirming the discretion of the trial court to grant new trials, the Texas Supreme Court has implicitly rejected the standard we adopt today. Further, the Texas Supreme Court placed strictures on the trial court's discretion while explicitly referencing the successful Fifth Circuit approach as a model. Therefore, I suggest that we adopt the Fifth Circuit standard

for reviewing such orders because it is a standard that is structured to afford deference to *both* the jury's verdict and the trial court's necessary oversight. Using that standard, I would deny the petition for writ of mandamus.

I agree with the Majority that:

1. Under the abuse-of-discretion mandamus standard, we defer to the trial court's factual determinations if they are supported by the evidence, but we review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

2. A trial court's discretion to grant a motion for new trial is not limitless and is abused in particular by ordering a new trial based solely on "in the interest of justice." *See In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210, 213 (Tex. 2009) (orig. proceeding) (holding "that discretion is not limitless").

3. To the extent that this new trial order rests solely upon "the interests of justice," it is an abuse of discretion. *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.).

4. The reviewing court must ensure that an order granting a new trial is based upon a reason or reasons (1) for which a new trial is legally appropriate, and (2) 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. *See In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89. (Tex. 2012) (orig. proceeding).

5. The new trial order in this case facially complies with the requirements of *In re United Scaffolding, Inc*.

6. An appellate court "may conduct a merits-based review of the reasons given for granting a new trial" to determine whether the record supports the articulated reason(s). *See In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 761–62 (Tex. 2013) (orig. proceeding).

7. Although the Texas Supreme Court does not articulate when an appellate court "must" conduct a merits-based review of the new trial order, we should do so in this case because we cannot otherwise give any scrutiny to the particular reasons articulated for granting the new trial in this case.

8. The Texas Supreme Court has not prescribed an appropriate standard for this court to use in conducting the merits-based review.

I disagree, however, that a factual-sufficiency standard is the proper standard of review to apply in a petition for writ of mandamus, merits-based review of reasons for granting a motion for new trial. Therefore, under what I urge is a more appropriate, deferential standard of review, I also disagree that the trial court abused its discretion in granting Real Parties' motion for new trial.

II. REVIEW OF ORDERS GRANTING NEW TRIAL AFTER IN RE TOYOTA

The Majority faithfully traces the Texas Supreme Court's five-year path toward eliminating the unfettered discretion trial courts long held to grant new trials. The path culminated in the *In re Toyota* pronouncement that an appellate court "may conduct a merits review of the bases for a new trial order." *Id.* at 749. Stated differently, an appellate court may peek behind the order granting new trial

to determine whether the record supports the trial court's rationale. *Id.* I join issue with the Majority's description of the *In re Toyota* merits-based review as one to evaluate "the correctness of a new trial order setting aside a jury verdict." Ante at 5. Instead, the *In re Toyota* Court authorized the appellate court to review the record to evaluate "the correctness or validity of the orders' articulated reasons." 407 S.W.3d at 758. *In re Toyota* does not direct the appellate court to use the record to decide whether the trial court made the right decision. *In re Toyota* directs the appellate court to use the record to decide whether the trial court made its decision for the right reason.

The difference in these two types of review is subtle but material, and it turns completely upon the light in which the appellate court views the record. The traditional factual sufficiency review adopted by the Majority weighs all of the evidence, viewing it in the light most favorable to the jury findings. Ante at 8 (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003)). The trial court's presence during the trial becomes irrelevant because the appellate standard gives no consideration to the trial judge's participation in the trial. On the other hand, a record review that assesses the correctness of the reasons provided acknowledges both the vital oversight role of the trial judge and the limitations on the exercise of that oversight power.

The difficulty in crafting a standard of mandamus review of orders granting new trial on factual insufficiency is the tension between the judge and jury. We need not and may not pick one over the other. The Texas Supreme Court requires that we review the grant of a new trial order under a standard the gives respect to the jury *and* the trial court. *See In re Columbia*, 290 S.W.3d at 212 ("We do not

retreat from the position that trial courts have significant discretion in granting new trials."); *accord In re United Scaffolding*, 377 S.W.3d at 687 (having "reiterated the considerable discretion afforded trial judges in ordering new trials," the court clarifies that the standard of review "must both afford jury verdicts appropriate regard and respect trial court's significant discretion in these matters").

Neither do we write on a completely clean slate for an appropriate standard of review. Although a merits review of an order granting new trial is completely new to Texas practice, it is, as acknowledged by the *In re Toyota* Court, "old hat to our colleagues on the federal bench." 407 S.W.3d 758. The *In re Toyota* Court examined the Fifth Circuit approach to reviewing orders granting new trial for factual insufficiency. Though not binding precedent, the Fifth Circuit approach quelled the Court's policy concerns because it is a system for merits-based review that is established and successful in achieving respect for both jury and judge.

Following the *In re Toyota* Court's nudge in the right direction, Real Parties here urge this court to conduct its merits-based review on an abuse-of-discretion standard following the Fifth Circuit. Wyatt, however, urges this court to adopt a factual-sufficiency standard for reviewing the trial court's order granting a new trial for insufficient evidence. The Majority chooses the Wyatt approach, concluding that Real Parties' position affords this court "no ability to review new trial orders based on factual sufficiency" to ensure that the trial court has not substituted its judgment for that of the jury. Ante at 10. I heartily disagree with this conclusion.

The Texas Supreme Court has, as outlined above, specifically pointed to the Fifth Circuit model as one that achieves a proper balance between respect for both

jury verdicts and judicial discretion. *In re Toyota*, 407 S.W.3d at 759 (referring to *Cruthirds v. RCI, Inc. d/b/a Red Carpet Inn of Beaumont, Tex.*, 624 F.2d 632, 635–36 (5th Cir. 1980), as a decision in which the Fifth Circuit "'review[ed] the record carefully to make certain that the district court [did] not merely substitute[ ] its own judgment for that of the jury' when that court 'disregard[ed] the verdict and grant[ed] a new trial'" (alterations in original)). The order granting new trial in *Cruthirds*, like the order in this case, rested in part upon the trial court's conclusion that the verdict was against the great weight of evidence. 624 F.2d at 635. That the Texas Supreme Court found guidance in the decades-old Fifth Circuit model for reviewing new trial orders should give comfort in selecting that model for undertaking a review that gives respect to both the jury system and the judicial oversight of that system.

Federal Rule of Civil Procedure 59 grants a federal trial court "historic power to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Smith v. Transworld Drilling Co.*, 773 F.2d 610 612–13 (5th Cir. 1985). One of the grounds permissible for the exercise of that power is that the verdict is against the great weight of the evidence. *Id*. The trial judge must weigh all of the evidence, but it need not consider such evidence in the light most favorable to the nonmoving party. *Laxton v. Gap Inc.*, 333 F.3d 572, 586 (5th Cir. 2003).

Federal courts and commentators view the trial court's oversight role pursuant to Rule 59 "'as an integral part of trial by jury.'" *Transworld Drilling*, 773 F.2d at 613 (quoting C. Wright, *Federal Courts* 633 (4th ed. 1983)). On the other hand, federal courts of appeal "exercise 'particularly close scrutiny' over a

district court's grant of a new trial on evidentiary grounds in order 'to protect the litigants' right to a jury trial.'" *Cooper v. Morales*, 535 Fed. App'x 425, 431 (5th Cir. 2013) (quoting *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982)).

The *Cruthirds* decision, relied upon by the *In re Toyota* Court, urged that "[g]reat latitude in the trial court's authority is especially appropriate when the motion cites some pernicious error in the conduct of the trial. Then the trial court occupies the best vantage from which to estimate the prejudicial impact of the error on the jury." *Cruthirds*, 624 F.2d at 635. Shortly thereafter, the Fifth Circuit adopted three factors, including the "pernicious error" of *Cruthirds*, to strike a delicate balance between judge and jury: (1) the simplicity of the issues, (2) the extent to which the evidence is in dispute, and (3) the absence of any pernicious or undesirable occurrence at trial. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982). "When these three factors are not present it is more appropriate to affirm the district court's decision, recognizing its first-hand knowledge of the course of the trial." *Carbo Ceramics, Inc. v. Keefe*, 166 Fed. App'x 714, 717 (5th Cir. 2006). Stated differently, where the issues are relatively simple, the evidence is disputed but not hotly contested, and the trial did not involve prejudicial influences or improper trial tactics, then deference to the jury over the trial judge is more appropriate. *See id.*

Using this scope and standard of review, the decision of the federal trial court to grant a new trial for factual insufficiency or against the great weight of the

evidence[1] is upheld if any of the *Shows* factors is present or applicable. *Id.* Of note, however, the *Shows* factors guide the review of an order *granting* a new trial; federal appellate courts accord far more deference to the trial court's decision to *deny* a new trial than to a decision to *grant* a new trial. *Brady v. Fort Bend Cty.*, 145 F.3d 691, 713 (5th Cir. 1998). Such a shift in deference makes perfect sense because when the trial court denies a new trial there is no tension between judge and jury. But upon grant of a new trial, the *Shows* factors assist in determining whether circumstances exist that warrant deference to the trial court over the jury.

III. REVIEW OF THE NEW TRIAL ORDER

A merits-based review of the trial court's reasons for granting new trial in this case reveals the reasons to be correct. Application of the *Shows* factors favors deference to the trial court. The new trial order should be upheld.

A. The trial court's articulated reasons are confirmed correct on neutral record-evidence review.

The trial court granted Real Parties' motion for new trial on two bases:[2] (1) the jury's answer to Question No. 1(a) was contrary to the overwhelming weight of

[1] The "great weight" standard is contrasted in federal authority with the lesser, "greater weight" standard that would permit the trial court to substitute its judgment and grant a new trial where it concludes the evidence is merely insufficient. *See Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). The "great weight" standard for a motion for new trial is, however, a lower standard than the exacting standard for a directed verdict or judgment n.o.v. because those motions present a question of law and result in a final judgment. *See Shows*, 671 F.2d at 930 (citing *U.S. for Use and Benefit of Weyerhaeuser Co. v. Bucon Const. Co.*, 430 F.2d 420, 423 (5th Cir. 1970)).

[2] I quibble somewhat with the Majority's analysis of the jury's no-negligence response on ExxonMobil as a basis for the new trial. The jury's answer to Question No. 4 about ExxonMobil was not mentioned in the order granting new trial, but it was mentioned in the trial court's findings. I think the distinction is significant, as outlined below, because I believe the trial court's reference to the ExxonMobil finding is intended as factual support for the trial court's ultimate conclusion that the jury's answer to Question No. 1 about Wyatt was against the great weight and preponderance of the evidence. ExxonMobil was a settling party and is, therefore, not a party to this appeal. As such, I cannot see that

the evidence; and (2) Wyatt and its witnesses regularly injected evidence of collateral sources, which tainted the verdict. I examine the factual or quasi-factual findings made by the trial court either in its order granting new trial or in its findings of fact and conclusions of law to determine which, if any, of these findings is unsupported in the record such that the trial court's new trial order should be reversed.

1. Was the safety chain installed in an incorrect location?

The trial court makes the following factual determination: The "great weight and overwhelming preponderance of the evidence showed that the safety chain at issue in this case was installed in an incorrect location." The Majority states that "Wyatt did not dispute at trial that the safety chain was installed in an incorrect location, the condition was unreasonably dangerous, or that real parties were not warned of the incorrect installation." Ante at 18. Thus, we agree that this factual determination is supported by the record.

2. Did Wyatt install the safety chain in 2008 and did the safety chain move between 2008 and 2011?

The trial court makes the following factual determination: The "great weight and overwhelming preponderance evidence [sic] introduced at trial confirmed that Defendant Wyatt Field Services Company installed the safety chain in 2008 and that the chain remained in the same location until July 3, 2011."

The Majority accurately details the testimony of former ExxonMobil employee Merryman, plaintiff's expert Howell, Wyatt's expert Elveston, and

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the jury's answer to Question No. 4 would provide an independent basis for granting Real Parties a new trial against Wyatt.

Wyatt's representative Jordan. None testified that Wyatt did not install the chain. All affirmative evidence was that Wyatt installed the chain. Wyatt's own expert testified that it was "more likely" that Wyatt installed it. The parties joined issue on this point solely by virtue of the Wyatt testimony that Wyatt could not locate any documents to confirm that Wyatt installed it.

All evidence regarding movement of the chain is circumstantial evidence by negative omission. There is no evidence that the chain moved. To move the chain, a work order was required. None of the work orders in evidence show the chain moved. Wyatt has no documentation that the chain moved from 2008 to 2011.

Thus, although there was arguably a fact question on whether Wyatt installed the chain or whether the chain moved between 2008 and 2011, the trial court's factual determination is supported by the record.

3. Were the Plaintiffs / Real Parties warned?

The trial court makes the following factual determination: The "great weight and overwhelming preponderance of the evidence introduced at trial confirmed that Plaintiffs were never warned that the safety chain was incorrectly installed and had no reason to be aware of the danger." The Majority states that "Wyatt did not dispute at trial that . . . real parties were not warned of the incorrect installation." Ante at 18. Thus, we agree that this factual determination is supported by the record.

4. Did Wyatt repeatedly violate the trial court's orders in limine?

The trial court makes the following factual determination: The "Defendant and its witnesses regularly injected evidence of collateral sources into the case in

violation of the Court's order granting Plaintiff's motion in limine on this topic." The trial court also stated, in its findings, that Wyatt repeatedly violated the Court's limine orders, ignored the Court's admonishments, and injected inadmissible information into the case.

Neither Wyatt nor the Majority evaluates the record in this regard at all. Wyatt does not suggest the record does not support this finding. The Majority likewise does not suggest that the record does not support this finding. Instead, Wyatt argues solely that the trial court erred because defense counsel's alleged violation of the court's order "had no effect on whether the jury placed any liability on Defendant Wyatt." Led to the analysis by Wyatt, the Majority examines the trial court's factual statements purely from the standpoint of harm, not support. Ultimately, the Majority determines that "Wyatt's violation of the trial court's limine order could not have affected the jury's finding that Wyatt was not negligent, and any violation was harmless." Ante. at 31.

At the outset, I disagree that a harm analysis has anything to do with our review of the trial court's order granting a new trial. If Wyatt's violation of a motion in limine could not provide a basis for a new trial because, as the Majority concludes, limine orders are preliminary and violations of them are curable and waivable, then the Supreme Court would not have needed to perform a merits-based review of the record in *In re Toyota*. There, as here, the trial court's grounds for granting a new trial included Toyota's violation of an order in limine. 407 S.W.3d at 754–55. The Supreme Court stated that this reason, "(if accurate) would have been 'legally appropriate' grounds for new trial." *Id.* at 760. However, the Supreme Court's merits-based review of the record revealed that Toyota did not

violate the trial court's rulings. *Id.* at 761. Therefore, the record did not support that ground. "Support" is our inquiry; not harm.

Therefore, as Wyatt's sole allegation is that its conduct "did no harm," Wyatt fails to support its petition with any argument that it did comply with the trial court's limine orders or an argument that a merits-based review shows that Wyatt did not violate the trial court's limine orders. Nevertheless, a review of the record does support the trial court's factual statement. On the very last day of testimony in this three-week trial, the following exchange occurred outside the presence of the jury:

> THE COURT: At this time I would like to address the witness in this matter. This is the second time that you have injected a matter involving collateral source in the testimony here today.
>
> . . .
>
> THE COURT: I am instructing you at this time not to mention anything about government assistance or any other collateral source for compensation available through any kind of charity or any kind of, like I said, government program for these gentlemen. If you violate this Court's instruction, I will hold you in contempt.
>
> . . .
>
> THE COURT: I want to ask the witness real quickly, did you have a conversation with these attorneys about the motions in limine that were granted by the Court in this case?
>
> THE WITNESS: No.

Wyatt's counsel acknowledged failing to instruct the witness on the limine orders. The court's response to Wyatt's acknowledgement is striking:

> There's a right and wrong way to do this. Everybody has done this enough times to know how to question and examine a witness so

> as not to violate motions in limine and the orders of the Court. Moreover, the witnesses themselves know. I have witnesses that this isn't their first time in court. These are professional witnesses. It's amazing to the Court that people that know the rules that have done this so many times can stand up and plead ignorance and say, I'm sorry, I'm surprised by this happening and that happening.
>
> You have represented to the Court a number of times that you have gone back and spoken to certain witnesses [sic] and the first time I ask a witness whether or not you have done that he says no. I want to believe you but at the same time I have been told this now several times and you say something and then you proceed to do the opposite. So I'm afraid I can't continue to believe you.

Wyatt's counsel attempted to deflect the court's ire by suggesting that the Plaintiffs had "talked about records that you won't let in, too; so, I mean, you are not directing that directly at me, are you?" The trial court responded,

> I am saying that's got to stop. At this point, yes, I am directing that towards you. I don't have the same issue and nothing has been brought up like it has continually with respect to anybody else's conduct . . . ."

The foregoing exchange makes plain that this is neither a case, like *In re Toyota*, where the "record squarely conflicts with the trial judge's expressed reasons for granting a new trial,"[3] nor is it a case where the trial court, knowing the outcome of the case, has generated a set of facts not evident from the record. Instead, the record fully supports the statement that Wyatt repeatedly violated limine orders and that even before the jury returned its verdict, the trial court was concerned about Wyatt's conduct and the impact it was having on the trial.

[3] 407 S.W.3d at 759.

5. Was there any evidence of ExxonMobil's actual knowledge of the danger of the dummy nozzle system?

The trial court makes the following factual determination: "The jury's finding that ExxonMobil had actual knowledge of any unreasonable risk of harm/condition is not supported by factually sufficient evidence."

In its petition, Wyatt *stipulates* that the record contains no direct evidence that ExxonMobil had any actual knowledge of any unreasonable risk of harm or the condition of the improperly installed safety chain. Wyatt points to no circumstantial evidence of actual knowledge. Moreover, Wyatt's two-paragraph discussion of this finding does not dispute the trial court's finding. Instead, Wyatt urges that the jury's finding (Question No. 4) that ExxonMobil had actual knowledge is rendered moot by the answers to other questions. Similarly, the Majority sidesteps a merits-based review of the record to determine whether the trial court's finding is supported and instead concludes that "the jury's no-liability finding in favor of Wyatt renders any liability finding against ExxonMobil immaterial." Ante at 25. I again urge that this legal analysis, akin to alleged charge error on traditional appeal from a judgment on jury verdict, is askew of the analysis we are to perform.

The trial judge did not grant a new trial to Real Parties against Wyatt because the jury did or did not have evidence of ExxonMobil's actual knowledge. Finding of fact number 5 makes clear that the trial judge granted a new trial to Real Parties against Wyatt because the jury's answers to several questions, viewed together and in light of the evidence, caused the trial judge to conclude that "the jury failed to follow the Court's instructions and simply decided to place all

responsibility on ExxonMobil without regard to the legal standards set forth in the Court's charge." Whether the ExxonMobil finding is moot or immaterial for purposes of entry of judgment does not speak to whether the trial judge's factual statement about the evidence of actual knowledge has support in the record.

A merits-based review of the record confirms that (1) there is no direct evidence that ExxonMobil had actual knowledge, and (2) there is no circumstantial evidence from which a proper inference of actual knowledge could be indulged. The trial court's factual determination that there is insufficient evidence to support the jury's answer to Question No. 4 about ExxonMobil's actual knowledge is supported by the record and by Wyatt's stipulation.

B. The trial court's unchallenged finding of pernicious or undesirable conduct by Wyatt, when evaluated under the Fifth Circuit model, requires deference to the trial court's new trial order.

Having concluded that the record supports the factual statements made by the trial court in granting the new trial, I turn to the *Shows* factors from the Fifth Circuit model. If any one of them is present, as outlined above, deference should be accorded the trial judge's decision to grant a new trial. *Shows*, 671 F.2d at 930.

1. The simplicity of the issues.

My review of Fifth Circuit authority suggests that few if any cases have failed to meet this factor. *See, e.g.*, *Ellerbrook v. City of Lubbock, Tex.*, 465 Fed. App'x 324, 336–37 (finding factor one inapplicable because a Title VII retaliation claim presents a relatively simple issue). If retaliation is simple, negligence as the principal issue is also simple. Because the issues are not complex, factor one is not present and suggests deference to the jury.

2. The extent to which the evidence is in dispute.

Notwithstanding that the underlying trial lasted several weeks, the actual disputes between the parties or in the evidence were few. Most of the evidence in the case was admitted without objection. The parties hotly contested the legal theory by which the Real Parties' case needed to be submitted and how to treat ExxonMobil under Chapter 33. But the parties narrowed their disputes to a very few, as is reflected by the Majority's presentation of the evidence, rendering more evidence undisputed than disputed. *See, e.g.*, *Carbo Ceramics, Inc.*, 166 Fed. App'x at 717 (finding factor two inapplicable because, "although the evidence is this case was disputed, there were numerous areas of agreement between the parties"). Because the evidence is not hotly disputed, factor two is not present and suggests deference to the jury.

3. The absence of any pernicious or undesirable occurrence at trial.

Factor three is present at a high degree and this *Shows* factor therefore tips the ultimate analysis in favor of deference to the trial court. Specifically, as the foregoing discussion of limine order violations reveals, the record supports the trial judge's statement that Wyatt engaged in a pattern of disregarding limine orders. Wyatt's counsel refused to admonish witnesses on excluded evidence and, in the view of the trial court, did so while deliberately misleading the court with reassurances that limine orders had been communicated to witnesses. Wyatt's counsel displayed inadmissible evidence to the jury—evidence that the judge and jury saw but which this appellate court cannot.

In addition to these referenced exchanges previously excerpted, the trial judge admonished the lawyers again just before closing argument. Giving a

specific example once again, the judge highlighted that Wyatt's counsel assured the court that a document had been redacted before showing it to the jury, but when the document appeared on the screen, it was not and therefore "flashed up there to let everybody know there was another defendant in the case." The court stated: "I don't trust the parties in the matter to do [redactions] on their own," and based upon the parties' three-week track record for not getting redactions accomplished and showing the jury information that was not admitted, "if [during closing argument] something is put up that's violative of the court order or is not reflective of what the record shows as the agreements of counsel with respect to evidence in this case, I am going to sanction you."

Though, as outlined above, a merits-based review fully supports the "correctness" of the trial court's finding that pernicious and undesirable conduct occurred, no merits-based review could speak to the impact such conduct actually had on the trial, the jury, and the jury's resolution of the issues. However, the trial court, having observed three weeks of trial, believed that conduct infected this jury trial and deprived Real Parties of a fair trial. There is no appellate methodology for evaluating whether the trial court was correct about that conclusion and neither Texas authority nor federal authority suggests that the appellate court should try. This is the definition of discretion.

Because factor three is present, *Shows* requires deference to the trial court's decision to grant a new trial.

C. The Majority's factual-sufficiency deference to implied jury findings eliminates all trial-court discretion.

The Majority defers entirely to the jury and thereby disagrees with the trial court's "great weight and overwhelming preponderance of the evidence" determination. For example, the Majority states: "The jury could have found Jordan's testimony that he found nothing in Wyatt's files to confirm that Wyatt had done the work was more credible than the testimony based on a single computer entry showing that Wyatt had done the work." Ante at 23.

Second, as the Majority's analysis illustrates, using the factual-sufficiency standard and performing a harm analysis has the effect of asking whether the trial court committed reversible error instead of asking what I urge is the correct question: Is there support in the record for the trial court's factual statement?

IV. CONCLUSION

The Majority performs a factual-sufficiency review, applying all permissible inferences and deferring to all credibility determinations that we presume flow in support of the jury's answers, and then overlays a harm analysis. As such, the Majority has applied precisely the standard that we would have applied had the trial court never made its new-trial decision and, instead, the losing party had challenged the factual sufficiency of the evidence by regular appeal. For purposes of a motion for new trial, we have rendered the trial court irrelevant. Because the trial court's stated reasons are "correct" on this record and because the trial court was in the best position to determine whether Wyatt's pernicious conduct in violating limine orders operated to prejudice the jury and deprive Real Parties of a

fair trial, I would hold that the trial court did not abuse its limited discretion. Because the Majority holds otherwise, I respectfully dissent.

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, Jamison, and McCally. (Jamison, J., majority).