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Exceptional Circumstances: Texas Mandamus Moves into a Bleak House

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EXCEPTIONAL CIRCUMSTANCES: TEXAS MANDAMUS MOVES INTO A BLEAK HOUSE

Timothy D. Martin*

ABSTRACT

This comment traces the history and application of Texas mandamus relating to new trial orders. The focus of the comment is the break from tradition represented by the Texas Supreme Court’s recent decision, In re Columbia Medical Center of Las Colinas, which was handed down in July, 2009. It critique’s the court’s ever-expanding application of mandamus and proposes a more deliberate solution involving rule changes and legislation.

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EXCEPTIONAL CIRCUMSTANCES: TEXAS MANDAMUS MOVES INTO A BLEAK HOUSE
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INTRODUCTION

“Tom Jarndyce was often in here. He got into a restless habit of strolling about when the cause was on, or expected, talking to the little shopkeepers, and telling ’em to keep out of Chancery, whatever they did. ‘For,’ says he, ‘it’s being ground to bits in a slow mill; it’s being roasted at a slow fire; it’s being stung to death by single bees; it’s being drowned by drops; it’s going mad by grains.’”¹

The characters in Dickens’s Bleak House spent decades in the equitable courts of the English Chancery to resolve a will contest—only to discover in the end that those equitable proceedings depleted the entire estate over which they struggled for so long.² Like those hopeful Jarndyce and Jarndyce litigants,³ the parties involved in the recent Texas Supreme Court mandamus decision, In re Columbia Medical Center of Las Colinas,⁴ endured a withering array of court proceedings, debilitating costs, and heartache for years on end.⁵ So it would probably disappoint—but not surprise—Charles Dickens to learn that “[a]lthough mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.”⁶ Because of the Columbia decision, when a new-trial order dissatisfies a litigant, the litigant can use a new legal

¹ CHARLES DICKENS, BLEAK HOUSE 50 (Bradbury & Evans 1853).
² See generally id.
³ See generally id.
⁴ 290 S.W.3d 204 (Tex. 2009).
⁵ See Relators’ Petition for Writ of Mandamus at 1, In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204 (Tex. May 23, 2006) (No. 06-0416) (noting that the suit was first filed in 2002).
⁶ Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993).
device to cause further delay and expense to the opposing side. This diminishes the value of the lessons learned from Dickens’s novel and the nineteenth-century English Chancery reform that followed it. 

Recently, the Texas Supreme Court used mandamus—an order to a lower court or official—to curtail the broad discretion Texas trial courts had for more than 150 years to grant motions for new trials in jury trials without interference from appellate courts. And for almost 400 years, common law courts limited mandamus relief mainly to nondiscretionary or ministerial functions. But the Texas Supreme Court injected doubt into those limits on mandamus relief

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8 See Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 CORNELL L. REV. 1181, 1227 (2005) (discussing Dickens’s influence on the reform movement that merged law and equity in England); Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.); Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77 (Eng.).

9 “A writ issued by a court to compel performance of a particular act by a lower court or governmental office or body, usu. to correct a prior action or failure to act.” BLACK’S LAW DICTIONARY 1046–47 (9th ed. 2009).


when it ordered a trial court to “specify the reasons it . . . ordered a new trial.”\(^{12}\) This comment addresses what the Columbia ruling implied and analyzes the decision’s likely impact not only on new-trial orders for jury trials, but also on other similar discretionary functions of trial courts in Texas. And it proposes a more reliable solution—procedural rule-making—than mandamus for the problems the supreme court tried to solve.

Part I briefly examines the history of mandamus. It focuses on that history’s impact on new-trial and other similar orders, from early English common law to the birth of the Republic of Texas. Part II comprises a review of how the Texas courts developed and applied new tests to determine whether to hear or grant mandamus petitions—again with a focus on new-trial orders. Part III analyzes and critiques the Columbia ruling’s use of the exceptional circumstances test and its relationship to legislative intent and court precedent.\(^ {13}\) Part III concludes with an analysis of the new layers of review the ruling may have created and the likely impact on trial courts, appellate courts, the supreme court, litigants, juries, and other discretionary rulings a trial court makes during its regular course of business.

I. HISTORICAL BACKGROUND

The history of mandamus is long, complex, and far-reaching.\(^ {14}\) This part discusses history relevant to the review of new-trial orders in today’s Texas courts. Many of the underlying principles and uses of mandamus have remained the same, such as compelling an official to perform a ministerial function,\(^ {15}\) but the courts have expanded others, such as

\(^{12}\) Columbia, 290 S.W.3d at 215.

\(^{13}\) In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009).

\(^{14}\) E.g., Bagg’s Case, (1615) 77 Eng. Rep. 1271.

\(^{15}\) Id. at 1273.
correcting an abuse of discretion.\textsuperscript{16} Section A traces mandamus from its birth to the founding of the Republic of Texas. Section B follows the development of mandamus through the early years of Texas’s statehood. And Section C tracks mandamus in Texas to the middle of the twentieth century to lay a framework for modern mandamus analysis.

A. FROM THE KING’S BENCH TO THE REPUBLIC OF TEXAS

Professor Richard Flint charts the origins of mandamus to the early 17th century.\textsuperscript{17} Lord Coke, Chief Justice of the King’s Bench, acted with little or no precedent to restore a magistrate to office after his fellow magistrates wrongfully removed him.\textsuperscript{18} But it wasn’t until the mid-to-late 18th century that Lord Mansfield, a successor to Lord Coke as Chief Justice on the King’s Bench, articulated the enduring basis for mandamus.\textsuperscript{19} Namely, Lord Mansfield held mandamus proper only when (1) there was no other “specific remedy” available, and (2) there had been an “improper or capricious exercise of discretion.”\textsuperscript{20}

After the American Revolution, the Supreme Court of the United States considered the merits of mandamus relief in the famous case of \textit{Marbury v. Madison}.\textsuperscript{21} William Marbury and

\textsuperscript{16} Womack v. Berry, 291 S.W.2d 677, 683–84 (Tex. 1956).


\textsuperscript{18} Bagg’s Case, 77 Eng. Rep. at 1273, 1282; Flint, \textit{supra} note 17, at 10–14.

\textsuperscript{19} Flint, \textit{supra} note 17, at 20.

\textsuperscript{20} Id. at 15–16 (quoting R v. Askew, (1768) 98 Eng. Rep. 139, 141 (K.B.); R v. Barker, (1762) 97 Eng. Rep. 823, 824–25 (K.B.)).

\textsuperscript{21} 5 U.S. (1 Cranch) 137 (1803); Flint, \textit{supra} note 17, at n.94.
others, who President Adams duly appointed as justices of the peace, petitioned the Supreme Court directly for mandamus to compel the Secretary of State to deliver their commissions.\textsuperscript{22} Professor Flint noted that while the Court found the legislation\textsuperscript{23} granting it the power to issue mandamus under its \textit{original} jurisdiction unconstitutional, the Court still retained the power to “revise and correct decisions of the lower courts as an exercise of \textit{appellate} jurisdiction.”\textsuperscript{24} Relying on the reasoning of Lord Mansfield, Chief Justice Marshall wrote that the person seeking the writ “must be without any other specific and legal remedy.”\textsuperscript{25} Marshall also made it clear that the Court could compel performance of ministerial duties using mandamus.\textsuperscript{26}

By the time the Republic of Texas established its independence from Mexico, the United States Supreme Court had embraced Lord Mansfield’s position and expanded mandamus to encompass more than just ministerial functions.\textsuperscript{27} In another opinion written by Chief Justice Marshall, the Court held that it could act when a lower court plainly exceeded its authority or exercised improper discretion.\textsuperscript{28} But in the Republic of Texas, the focus for mandamus was on whether there was an adequate remedy on appeal.\textsuperscript{29}

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\textsuperscript{22} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803).
\textsuperscript{23} Judiciary Act of 1789, ch. 20, §13, 1 Stat. 73.
\textsuperscript{24} Marbury, 5 U.S. at 168–69 (emphasis added); Flint, \textit{supra} note 17, at 34–36.
\textsuperscript{25} Marbury, 5 U.S. at 168–69.
\textsuperscript{26} Id. at 151.
\textsuperscript{27} Flint, \textit{supra} note 17, at 34–36 (citing \textit{Ex parte} Burr, 22 U.S. (9 Wheat) 529, 531 (1824)).
\textsuperscript{28} Burr, 22 U.S. at 530–31.
\textsuperscript{29} See Flint, \textit{supra} note 17, at 48–53 (citing Bradley v. McCrabb, Dallam 504 (Tex. 1843)).
\end{flushright}
case”\(^{30}\) on mandamus in Texas, a district court clerk ousted in a disputed election petitioned the 
trial court to restore him to office.\(^{31}\) In affirming the trial court’s mandamus order, the Supreme 
Court of the Republic of Texas went a step further than using mandamus only when there was no 
adequate remedy on appeal; it held that mandamus was also proper where other “other modes of 
redress [were] inadequate or tedious.”\(^{32}\) Though Texas courts later retreated from the idea that 
the mere difficulty of an appeal made it an inadequate mode of redress, the recent rulings on 
mandamus seem to have revived that idea.\(^{33}\)

B. THE DEVELOPMENT OF NEW-TRIAL-ORDER MANDAMUS AFTER STATEHOOD

From the acceptance of Texas into the United States, the Texas Supreme Court resisted using mandamus to alter a trial court’s grant of a motion for a new trial.\(^{34}\) Early on, in \textit{Sweeny v. Jarvis},\(^{35}\) the supreme court held that an abuse of discretion might cause it to reverse a trial 
court’s grant of a new-trial motion—though it didn’t find an abuse of discretion in that case.\(^{36}\)


\(^{31}\) \textit{Bradley}, Dallam 504 at 504–05.

\(^{32}\) \textit{Id.} at 506.

\(^{33}\) Compare \textit{In re Columbia Med. Ctr. of Las Colinas}, 290 S.W.3d 204, 215 (Tex. 2009) with 

\(^{34}\) See, e.g., \textit{In re Bayerische Motoren Werke}, AG, 8 S.W.3d 326, 326 (Tex. 2000); \textit{Johnson v. 
Seventh Court of Appeals}, 350 S.W.2d 330, 331 (Tex. 1961); \textit{Missouri-Kansas-Texas R.R. Co. of 
Tex. v. Brewster}, 78 S.W.2d 575, 576 (Tex. 1934); \textit{Wright v. Swayne}, 140 S.W. 221, 224 
(1911); \textit{Sweeny v. Jarvis}, 6 Tex. 36, 39 (1851).

\(^{35}\) 6 Tex. 36 (1851).

\(^{36}\) \textit{Sweeny}, 6 Tex. at 43.
The *Sweeny* opinion revealed a tension between the concern that courts might “lend[] too easy an ear” to a request for a new trial and the difficulties of reviewing new-trial rulings. But it recognized a strong presumption in favor of a trial court’s ruling. Just two years later, in *Hagerty’s Executors v. Scott*, the court suggested in dicta that a trial court could order a new trial if a party suffered an injustice by the denial of a continuance. Though still strongly favoring a trial court’s discretion to grant a new-trial motion, the *Sweeny* and *Scott* courts opened the door to possible appellate review of that discretion.

Shortly after, in *Goss v. McLaren*, the supreme court outlined a traditional limit on a trial court’s discretion to grant a new trial. In a suit to recover a tract of land, McLaren failed to answer because he relied on an agent to appear for him and the court entered a default judgment against him. After the term of the trial court expired, McLaren filed a motion for a new trial and the court granted it. The supreme court held that because its term had expired, the trial court “had no authority . . . to set aside the former judgment and direct a new trial.”

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37 Id. at 39–40.
38 Id. at 43.
39 10 Tex. 525 (1853).
40 *Hagerty’s Ex’rs v. Scott*, 10 Tex. 525, 529–30 (1853).
41 *Id.*; *Sweeny v. Jarvis*, 6 Tex. 36, 43 (1851).
42 17 Tex. 107 (1856).
43 *Goss v. McLaren*, 17 Tex. 107, 121 (1856).
44 Id. at 117, 121.
45 Id. at 121.
46 Id.
Though the *Goss* court imposed a new limit on granting new-trial motions, it reaffirmed a presumption in favor of the trial court’s actions when ruling on a new-trial motion.47

Seventy-five years later, in *Gulf, Colorado & Santa Fe Railway Company v. Canty*, the court added a second exception to the general proscription against using mandamus to modify a new-trial order.49 In *Canty*, the trial court denied the defendant’s motion to enter judgment on the verdict and ordered a new trial because it found “irreconcilable conflicts” in the jury’s answers to special issues.50 But the supreme court found no conflict in the jury’s answers and held that mandamus was necessary when a trial court granted a new trial “solely because of ‘irreconcilable conflict’ in the answers of the jury . . . if no such conflict in fact existed.”51 The supreme court found that entering judgment on a proper verdict was a *ministerial function*—not a discretionary function—and that failure to enter judgment would leave the injured party without an adequate remedy.52 So though the court established that two limited circumstances allowed mandamus to issue against new-trial orders, it still adhered to the principle that mandamus was proper only when circumstances reduced a discretionary function to a ministerial duty.53

C. TEXAS COURTS EXPAND, CONTRACT, AND REAFFIRM MANDAMUS IN THE INTEREST OF JUSTICE

For a short time between 1925 and 1927, the Texas legislature authorized interlocutory

47 *Id.*

48 285 S.W. 296 (Tex. 1926); Flint, *supra* note 17, at n.226.


50 *Id.* at 298.

51 *Id.* at 298–300, 302.

52 *Id.* at 299–300.

53 *Id.*; *Goss v. McLaren*, 17 Tex. 107, 121 (1856).
appeal from new-trial orders.\footnote{Plummer v. Van Arsdell, 299 S.W. 869, 869 (Tex. 1927).} In \textit{Plummer v. Van Arsdell}, the trial court granted a new trial to the Plummers during the time the statute authorized an appeal from new-trial orders—but the appeal did not reach the supreme court until after the legislature repealed the statute.\footnote{299 S.W. 869 (Tex. 1927).} The supreme court ruled that the lack of a saving clause in the repealing act deprived the Plummers of a vested right so it granted the Van Arsdells’ motion to dismiss the appeal.\footnote{Id. at 869.}

In 1956, the supreme court finally issued mandamus to correct an abuse of discretion by a trial court.\footnote{Id. at 870.} In \textit{Womack}, the successor trustee to a testamentary trust filed suit to take possession of the trust assets.\footnote{Womack v. Berry, 291 S.W.2d 677, 683–84 (Tex. 1956); Flint, supra note 17, at 72–75.} The beneficiaries resisted the suit, but one of them was serving a four-year commitment in the military.\footnote{Womack, 291 S.W.2d at 680.} The trustee filed a motion to sever the claims of the beneficiaries and stay only the proceedings related to the soldier, but the trial court denied the motion.\footnote{Id. at 681.} The supreme court held that refusing the severance motion could irreparably harm the trustee and found the trial court’s denial was “a clear abuse of discretion” because “it was clearly the duty of the court to order a separate trial.”\footnote{Id. at 683; Flint, supra note 17, at 74–75.} So the \textit{Womack} court reinforced the principle that an abuse

\begin{itemize}
\item \textit{Plummer v. Van Arsdell}, 299 S.W. 869, 869 (Tex. 1927).
\item 299 S.W. 869 (Tex. 1927).
\item \textit{Id.} at 869.
\item \textit{Id.} at 870.
\item \textit{Womack v. Berry}, 291 S.W.2d 677, 683–84 (Tex. 1956); Flint, \textit{supra} note 17, at 72–75.
\item \textit{Womack}, 291 S.W.2d at 680.
\item \textit{Id.} at 681.
\item \textit{Id.}
\item \textit{Id.} at 683; Flint, \textit{supra} note 17, at 74–75.
\end{itemize}
of discretion can take place only when a discretionary function is reduced to a single choice.\textsuperscript{63} Even though abuse of discretion became available as a reason to impose mandamus, the Texas Supreme Court remained insistent that trial courts still retained wide latitude to grant new trials.\textsuperscript{64} The \textit{Johnson I} court said it was a well-established rule that the supreme court might be able to review new-trial orders in certain circumstances, but it held that “[t]he discretion and judgment of the trial court in granting a new trial cannot be controlled or directed by mandamus.”\textsuperscript{65} The \textit{Johnson I} court went on to reiterate the two settled situations that allowed mandamus to issue against a new-trial order:

(1) When the trial court’s order was wholly void as where it was not entered in the term in which the trial was had; and

(2) Where the trial court has granted a new trial specifying in the written order the sole ground that the jury’s answers to special issues were conflicting.\textsuperscript{66}

In 1985, the Texas Supreme Court plainly voiced what the 1853 \textit{Scott} case implied—that is, “a trial court has discretion to grant a new trial in the interest of justice.”\textsuperscript{67} The court held “that the granting of a new trial for that reason is within the trial court's discretion.”\textsuperscript{68} In \textit{Johnson II}, an assailant brutally raped and beat the plaintiff in her apartment and she sued the security

\textsuperscript{63} \textit{Womack}, 291 S.W.2d at 683–84.

\textsuperscript{64} Johnson v. Seventh Court of Appeals, 350 S.W.2d 330, 331 (Tex. 1961).

\textsuperscript{65} \textit{Id.} at 331–32.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 916 (Tex. 1985) \textit{overruled in part by In re Columbia Med. Ctr. of Las Colinas}, 290 S.W.3d 204, 215 (Tex. 2009); Hagerty’s Ex’rs v. Scott, 10 Tex. 525, 529–30 (1853).

\textsuperscript{68} \textit{Johnson II}, 700 S.W.2d at 916.
guard who was on duty at the time.\textsuperscript{69} The trial court granted the plaintiff’s motion for a new trial because the jury failed to answer the damage question.\textsuperscript{70} The \textit{Johnson II} court upheld the new-trial order and stressed that to get mandamus relief, the requesting party must jump a very high hurdle: “The relator must establish, under the circumstances of the case, that the facts and law permit the trial court to make but one decision.”\textsuperscript{71} It further insulated the trial court’s decision by saying that “[a] mere error in judgment is not an abuse of discretion.”\textsuperscript{72} This case is significant because even though the reason stated in the motion for new trial—that there were conflicts in the jury’s answers—may not have been correct and therefore subject to one of the traditional exceptions, the supreme court refused mandamus relief because the trial court granted the motion “in the interest of justice and fairness.”\textsuperscript{73}

In \textit{Walker v. Packer},\textsuperscript{74} the supreme court held that in order to issue mandamus, it must find “a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.”\textsuperscript{75} The supreme court found that “[s]ince the 1950’s . . . [it had] used the writ to correct a ‘clear abuse of discretion’ committed by the trial court” and that at times it

\begin{itemize}
  \item \textsuperscript{69} \textit{Id.}
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.} at 916, 918.
  \item \textsuperscript{72} \textit{Id.} at 916.
  \item \textsuperscript{73} \textit{Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 916 (Tex. 1985) overruled in part by In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009).}
  \item \textsuperscript{74} 827 S.W.2d 833 (Tex. 1992).
  \item \textsuperscript{75} \textit{Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (emphasis added).}
\end{itemize}
had failed to apply any test for an adequate legal remedy. 76 A medical malpractice action, the
Walker case called on the supreme court to decide whether mandamus was suitable for discovery
rulings the trial court issued before trial. 77 The supreme court found that while the trial court
misapplied the law—amounting to an abuse of discretion—a normal appeal was an adequate
remedy precluding the use of mandamus. 78

Significantly, the court rejected any sort of balancing test, holding that “an appellate
remedy is not inadequate merely because it may involve more expense or delay than obtaining an
extraordinary writ.” 79 Rather, the court held mandamus proper only when a party’s substantial
rights were in jeopardy. 80 It pointed out that “[t]his proceeding . . . has delayed the trial on the
merits for over two years.” 81

In what Professor Flint characterized as opening a “Pandora’s Box,” 82 the Texas Supreme
Court, in Canadian Helicopters Ltd. v. Wittig, 83 decided that denying mandamus relief in special
appearance cases might cause more than “mere increased cost and delay” and that such an

76 Id. (citing Joachim v. Chambers, 815 S.W.2d 234, 237 (Tex. 1991); Jampole v. Touchy, 673
S.W.2d 569, 574 (Tex. 1984); West v. Solito, 563 S.W.2d 240, 244 (Tex. 1978); Womack v.
Berry, 291 S.W.2d 677, 682 (Tex. 1956)).

77 Walker, 827 S.W.2d at 835–38.

78 Id. at 840, 844.

79 Id. at 842; but see Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843).

80 Walker, 827 S.W.2d at 842.


82 Flint, supra note 17, at 106.

83 876 S.W.2d 304 (Tex. 1994).
increased burden could make a normal appeal inadequate.\textsuperscript{84} Even though, at that time, the court did not allow mandamus for special appearance rulings, it hinted that “truly extraordinary circumstances” might make it appropriate.\textsuperscript{85} In his dissent, Justice Hecht derided this “new concept [] that a \textit{super-clear} abuse of discretion can make appeal an inadequate remedy when a \textit{merely clear} abuse cannot.”\textsuperscript{86} Justice Hecht expressed concern that the court could issue mandamus in situations not ordinarily ripe for it whenever it found extraordinary circumstances.\textsuperscript{87} This is especially ironic considering that Justice Hecht would later create a balancing test for mandamus based on “exceptional circumstances.”\textsuperscript{88}

II. APPLYING MANDAMUS PRINCIPLES

After older court decisions laid the basic foundations of mandamus, modern Texas courts began to grapple with what they perceived to be exceptional, or extraordinary, circumstances.\textsuperscript{89} The court began to look toward balancing public and private interests to decide whether mandamus was an appropriate tool in a given situation.\textsuperscript{90} These efforts culminated in more and

\begin{itemize}
\item \textsuperscript{84} Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308–09 (Tex. 1994), \textit{superseded by statute}, \textsc{Tex. Civ. Prac. \\& Rem. Code} § 51.014(a)(7) (Vernon 2009); Flint, \textit{supra} note 17, at 106.
\item \textsuperscript{85} \textit{Canadian Helicopters}, 876 S.W.2d at 309.
\item \textsuperscript{86} \textit{Id.} at 310–11 (Tex. 1994) (Hecht, J., dissenting) (emphasis added).
\item \textsuperscript{87} See \textit{id.} at 310–11 (Tex. 1994) (Hecht, J., dissenting) (noting that under the super-clear abuse of discretion standard, the abuse-of-discretion and lack-of-adequate-remedy elements merge).
\item \textsuperscript{88} \textit{In re} Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (Hecht, J.).
\item \textsuperscript{89} CSR Ltd. v. Link, 925 S.W.2d 591, 596–97 (Tex. 1996).
\item \textsuperscript{90} \textit{Prudential}, 148 S.W.3d at 136.
\end{itemize}
more appellate supervision of what traditionally had been the province of the trial court. This part examines these developments as they are relevant to new-trial orders and sets the stage for the critical analysis that follows in Part III. Section A examines the court’s first forays into applying mandamus to unusual situations. Section B analyzes a new balancing test the court began to use to determine when mandamus was applicable. And finally, Section C examines the most recent case law on mandamus for new-trial orders.

A. EXCEPTIONAL CIRCUMSTANCES

It didn’t take long for Texas jurisprudence to feel the impact of the dictum from Canadian Helicopters. Just two years later, Justice Spector, notably joined by Justice Hecht, wrote a majority opinion in CSR Limited v. Link that used “extraordinary circumstances” to justify mandamus relief. CSR, an Australian corporation, made a special appearance in Harris County, but the trial judge overruled the special appearance and asserted that the Harris County court had personal jurisdiction. The supreme court worked through the applicable tests and concluded that it was clear the Houston court did not have personal jurisdiction over CSR and that denial of the special appearance was a clear abuse of discretion.

Though the court noted that “increased cost and delay alone do not make an ordinary

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91 E.g., In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009); In re Masonite Corp., 997 S.W.2d 194, 197 (Tex. 1999); In re Barber, 982 S.W.2d 364, 365 (Tex. 1998).

92 925 S.W.2d 591 (Tex. 1996).

93 CSR, 925 S.W.2d at 596–97; Flint, supra note 17, at 109–10.

94 CSR Ltd. v. Link, 925 S.W.2d 591, 593–94 (Tex. 1996).

95 Id. at 594–96.
appeal an inadequate remedy,” it relied on Canadian Helicopters to conclude that “extraordinary situations” may make an appellate remedy inadequate.⁹⁶ The court held that the existence of thousands of possible plaintiffs, the pressure on CSR to settle regardless of the merits, and the strain on the state’s resources created extraordinary circumstances requiring the court to intervene.⁹⁷ Applying the reasoning Justice Hecht earlier decried—distinguishing “clear” from “super-clear” abuse of discretion—the court said it would permit “mandamus relief from the denial of a special appearance only when personal jurisdiction is clearly and completely lacking.”⁹⁸

Justice Baker wrote a forceful dissent where he argued that the majority opinion abrogated precedent.⁹⁹ He wrote that “[i]f we [do] not follow our own decisions, no issue could ever be considered resolved.”¹⁰⁰ Justice Baker also argued that if the court needed interlocutory appeal for special appearance motions, the rule-making process or the legislature should authorize it.¹⁰¹ The next year, the Texas Legislature responded by enacting a provision allowing interlocutory appeal from special appearance motions.¹⁰²

⁹⁶ Id. at 596 (citing Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 309–10 (Tex. 1994)).
⁹⁷ Id. at 596–97; Flint, supra note 17, at 109–10.
⁹⁸ CSR, 925 S.W.2d at 597; Canadian Helicopters, 876 S.W.2d at 310–11 (Hecht, J., dissenting).
⁹⁹ CSR, 925 S.W.2d at 596–97 (Baker, J., dissenting) (quoting Weiner v. Wasson, 900 S.W.2d 316, 320 (Tex. 1995)); Flint, supra note 17, at 110.
¹⁰⁰ CSR Ltd. v. Link, 925 S.W.2d 591, 601–02 (Tex. 1996) (Baker, J., dissenting).
¹⁰¹ Id. at 599–604 (Baker, J., dissenting); Flint, supra note 17, at 110.
¹⁰² TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7) (Vernon 2009); TEX. R. CIV. P. 120a(1); see also Flint, supra note 17, at n.420.
Two years after CSR, the supreme court heard a mandamus case, *In re Barber*, about the validity of an order to set aside a default judgment. In an opinion written by Chief Justice Phillips, and again joined by Justice Hecht, the court decided that “unique circumstances” compelled mandamus to reverse a trial court decision. The case was a personal injury suit in which the defendant answered the plaintiff’s complaint in a timely fashion. But because the district clerk was behind on filing, the defendant’s answer never made it into the case file. The court filed a default judgment against the defendant, but the parties agreed to an order setting it aside and granting a new trial. The judge told the clerk to affix a rubber stamp to the order but before the case went to trial, the judge had a heart attack and a new judge replaced him. The new judge ruled that the trial court had lost plenary power over the case because his predecessor had not properly signed the new-trial order. The defendant brought a mandamus action to compel the trial court to “acknowledge the validity of its own order.” The supreme court conceded that the rules required a signature on a new-trial order, but noted that those rules

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103 982 S.W.2d 364 (Tex. 1998).
104 *In re Barber*, 982 S.W.2d 364, 365 (Tex. 1998).
105 *Id.* at 365, 368.
106 *Id.* at 365.
107 *Id.*
108 *Id.*
109 *Id.*
110 *In re Barber*, 982 S.W.2d 364, 365 (Tex. 1998).
111 *Id.* at 368.
did not require a particular method of signing. The supreme court bypassed a Texas Court of Criminal Appeals opinion that held that even though a stamped signature could be valid, the judge must have personally stamped it or another must have stamped it “under [the judge’s] immediate authority and direction and in his presence.” The Texas Supreme Court admitted that the facts were uncertain about whether the original judge in Barber was actually present when the clerk stamped the new-trial order but concluded that it was unrealistic to require a judge’s physical presence in every case.

The supreme court held that “[u]nder these unique circumstances, because Barber has no other means of obtaining this specific review, mandamus relief is appropriate.” The language the court used in Barber—“unique circumstances”—was slightly different from that used by the Canadian Helicopters court—“truly extraordinary circumstances.” And the court recognized that an equitable bill of review—not mandamus—was the normal way to attack a final default judgment, but it is clear that the Barber court applied the same principles it discussed in the Canadian Helicopters dictum.

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112 TEX. R. CIV. P. 329b(c); Barber, 982 S.W.2d at 366.

113 Barber, 982 S.W.2d at 366 (emphasis added) (quoting Stork v. State, 23 S.W.2d 733, 735 (Tex. Crim. App. 1929));

114 Id. at 367.

115 Id. at 368 (emphasis added).

116 In re Barber, 982 S.W.2d 364, 368 (Tex. 1998).

117 Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 309 (Tex. 1994), superseded by statute, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7) (Vernon 2009).

118 Compare Barber, 982 S.W.2d at 368 with Canadian Helicopters, 876 S.W.2d at 309.
Justice Baker’s dissent in *Barber* focused on the requirement that to get a reversal of a trial court order through mandamus, a challenging party must show that “the facts and law permit the trial court to make but one decision.”\(^{119}\) And Justice Baker was far less flexible about whether the trial court could have ignored, the way the majority opinion did, the *Stork* requirement that a clerk stamp a new-trial order in the physical presence of the judge.\(^{120}\) He called the *Stork* requirement an important safeguard.\(^{121}\) Justice Baker argued that an abuse of discretion did not occur because the evidence reasonably supported the successor judge’s decision.\(^{122}\)

The next year, in the case of *In re Masonite Corporation*,\(^ {123}\) the supreme court granted mandamus relief for a transfer of venue—another order not generally subject to interlocutory review.\(^ {124}\) Hundreds of homeowners alleging defective building materials filed suits in two different counties against several manufacturers.\(^ {125}\) The trial judge denied the defendants’ transfer of venue motions but severed many of the claims and transferred them to sixteen

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\(^{119}\) *Barber*, 982 S.W.2d at 368 (Baker, J., dissenting) (citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985)).

\(^{120}\) *Barber*, 982 S.W.2d at 368 (Tex. 1998) (Baker, J., dissenting); *Stork*, 23 S.W.2d 733, 735 (Tex. Crim. App. 1929).

\(^{121}\) *Barber*, 982 S.W.2d at 369 (Baker, J., dissenting); *Stork*, 23 S.W.2d at 735.

\(^{122}\) *In re Barber*, 982 S.W.2d 364, 370 (Tex. 1998) (Baker, J., dissenting).

\(^{123}\) 997 S.W.2d 194 (Tex. 1999).

\(^{124}\) *In re Masonite Corp.*, 997 S.W.2d 194, 195–96 (Tex. 1999); *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(a) (Vernon 2009).

\(^{125}\) *Masonite*, 997 S.W.2d at 195–96.
different counties *on his own motion*.\textsuperscript{126} The supreme court reaffirmed—in an opinion written by Justice Enoch and yet again joined by Justice Hecht—that exceptional circumstances may justify mandamus.\textsuperscript{127} It held that “on rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional.”\textsuperscript{128} The supreme court seemed astonished that the trial court ordered venue transfers because “[a] trial court has no discretion to transfer venue on its own motion, even to a county of proper venue.”\textsuperscript{129} Justice Enoch particularly scorned the fact that the trial court created fourteen trials in fourteen different counties—all with built-in reversible error.\textsuperscript{130} Justice Enoch expressed the view that a normal appeal might be satisfactory for a single party, “but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.”\textsuperscript{131} Justice Enoch distinguished *Masonite* from the typical venue transfer case involving only a single court.\textsuperscript{132} “[H]ere,” he wrote, “the trial court has wrongfully burdened fourteen other courts in fourteen other counties, hundreds of potential jurors in those counties, and thousands of taxpayer dollars in those counties.”\textsuperscript{133}

\begin{enumerate}
\item[126] *Id.* at 196.
\item[127] *Id.* at 197.
\item[128] *Id.*
\item[129] *Id.*
\item[130] *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999).
\item[131] *Id.*
\item[132] *Id.* at 199.
\item[133] *Id.*
\end{enumerate}
Therefore, “[t]hese are ‘exceptional circumstances’ warranting mandamus relief.”

Justice Baker, consistent with his earlier dislike for exceptional circumstances mandamus rulings—and consistent with Professor Flint’s theme—wrote for the dissent. He reminded the court that it should not use mandamus merely because it is more convenient than a conventional appeal. And he pointed out that like earlier rulings granting petitions for mandamus based on exceptional circumstances, this one also involved a situation “not typically subject to mandamus.” Because both the statutes and the court rules precluded appeals from venue transfer motions, Justice Baker argued that mandamus simply was not appropriate.

Professor Flint expressed the idea that exceptional circumstances cases showed the Texas Supreme Court’s frustration and a “growing intolerance with the unwillingness of trial courts to interpret and apply the law correctly to the matters before them.” But the supreme court would extend the exceptional circumstances test even further in the years to come.

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134 Id.
135 See Flint, supra note 17, at 3 (discussing “the road of no return”).
136 In re Masonite Corp., 997 S.W.2d 194, 199 (Tex. 1999) (Baker, J., dissenting); see also, e.g., In re Barber, 982 S.W.2d 364, 370 (Tex. 1998) (Baker, J., dissenting).
137 Masonite, 997 S.W.2d at 199 (Baker, J., dissenting).
138 TEX. CIV. PRAC. & REM. CODE § 51.014(a) (Vernon 2009); TEX. R. CIV. P. 87(6); Masonite, 997 S.W.2d at 201 (Baker, J., dissenting) (citing CSR Ltd. v. Link, 925 S.W.2d 591, 597 (Tex. 1996)).
139 Masonite, 997 S.W.2d at 201 (Baker, J., dissenting).
140 Flint, supra note 17, at 114.
141 See generally In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204 (Tex. 2009); In re
B. BALANCING REMEDIES

Writing the majority opinion for *In re Prudential Insurance Company of America*\(^{142}\) in 2004, Justice Hecht announced a new balancing test\(^{143}\) that allowed appellate courts to weigh the advantages and disadvantages of mandamus to determine whether a normal appellate remedy met the adequacy requirement.\(^{144}\) Simply stated, the court held that “[a]n appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.”\(^{145}\)

The *Prudential* case concerned a lease dispute and a jury-trial waiver clause in the lease.\(^{146}\) The parties contracted to waive their right to a jury trial in any future lawsuit related to the lease, and nine months after the lease went into effect, the tenant sued to rescind the lease “because of a persistent odor of sewage.”\(^{147}\) But the tenant still demanded a jury trial.\(^{148}\) As a result, the landlord moved to quash the jury demand but the trial court refused the motion.\(^{149}\) The landlord then brought a mandamus action with the supreme court to enforce the jury

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\(^{142}\) 148 S.W.3d 124 (Tex. 2004).

\(^{143}\) *Prudential*, 148 S.W.3d at 136; Flint, *supra* note 17, 125.

\(^{144}\) *Prudential*, 148 S.W.3d at 136.

\(^{145}\) Id. at 136.

\(^{146}\) Id. at 127.


\(^{148}\) Id. at 127.

\(^{149}\) Id.
The supreme court held that parties were free to “contract as they see fit as long as their agreement does not violate the law or public policy.” The court pointed out that a party can waive its right to a jury trial when it fails to comply with procedural rules or waive other fundamental rights such as venue and personal jurisdiction. Justice Hecht, writing for the majority, found that “nearly every state court . . . has held that parties may agree to waive their right to trial by jury.” Citing Walker, the supreme court held as a matter of law that the trial court committed an abuse of discretion because it failed to properly apply the law.

But the second part of the Walker test, determining whether an adequate remedy on appeal existed, turned out to be a more thorny issue for the court. The court held that “[t]he operative word, ‘adequate’, has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations” that regulate the use of mandamus. The court realized it walked a tightrope because it acknowledged the “public and private” interests involved. The court articulated the tension between mandamus as an undue interference with orderly court proceedings and as a tool to “allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments” and

150 Id.

151 Id. at 129.

152 TEX. R. CIV. P. 216(a); Prudential, 148 S.W.3d at 130–31.


154 Id. at 135 (quoting Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992)).

155 Walker, 827 S.W.2d at 839.

156 Prudential, 148 S.W.3d at 136.

157 Id.
prevent private parties and the public from wasting resources on lengthy appeals.\footnote{158 Id. at 136.}

The supreme court expressed concern that the legislature might continue to expand interlocutory appeals.\footnote{159 In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 137 (Tex. 2004).} It expressed the view that lack of prudent mandamus relief had increased pressure on the legislature to create new interlocutory appeals that would be disruptive and burdensome to the courts.\footnote{160 Id. at 137–38.} As examples, the court cited expansion of legislatively-sanctioned interlocutory appeals for compulsory venue provisions, denial of a special appearance, and sufficiency of expert reports because of court decisions denying mandamus in those situations.\footnote{161 Id.} But the court cautioned that “the benefits of mandamus review are easily lost by overuse.”\footnote{162 Id. at 138.}

In applying its reasoning to the facts in the case, however, the court seemed far more concerned with Prudential’s loss of a contractual right than it did with balancing the benefits and detriments of mandamus.\footnote{163 Id.} Nowhere in the opinion did it discuss detriments of applying mandamus to the facts of the case—such as opening the door to a wave of new mandamus petitions.\footnote{164 See LaDawn H. Conway, Alexandra W. Albright & Devon D. Sharp, Civil Procedure: Appellate Practice and Procedure, 62 SMU L. REV. 951, 952 (2009) (suggesting that Prudential caused a dramatic increase the use of mandamus). And it only implicitly addressed the benefits when it discussed the need to enforce}
the contractual right to waive a jury trial.\textsuperscript{165}

In his dissenting opinion, Chief Justice Phillips echoed the sentiments of Justice Baker\textsuperscript{166} from past cases and urged a stricter adherence to the two-pronged standard pronounced in \textit{Walker}.\textsuperscript{167} He admitted that mandamus was more efficient than appeal but said, “[T]hat has never been the test.”\textsuperscript{168} He argued that “[i]f the writ were available to correct every reversible error as it occurred in the trial court, the writ would cease to be extraordinary, and appellate courts would soon find themselves embroiled in the management of the trial court’s docket.”\textsuperscript{169}

C. \textit{In re Columbia Medical Center of Las Colinas}

In 2009, the Supreme Court of Texas delivered a controversial and closely divided opinion that placed an entirely new limit on a trial court’s discretion to grant a motion for a new trial.\textsuperscript{170} In that opinion, the supreme court held that a trial court must give “clearly identified and reasonably specific” reasons for granting a new trial and that “in the interest of justice” was not a sufficient reason.\textsuperscript{171} More than 150 years ago, the supreme court held that “the judge has a discretion to grant a new trial whenever, in his opinion, wrong and injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the granting


\textsuperscript{166} \textit{See, e.g., In re Masonite Corp.}, 997 S.W.2d 194, 199 (Tex. 1999) (Baker, J., dissenting).

\textsuperscript{167} \textit{Prudential}, 148 S.W.3d at 141 (Phillips, C.J., dissenting); \textit{Flint}, \textit{supra} note 17, at 129.

\textsuperscript{168} \textit{Prudential}, 148 S.W.3d at 142 (Phillips, C.J., dissenting).

\textsuperscript{169} \textit{Id.} (Phillips, C.J., dissenting).

\textsuperscript{170} \textit{In re Columbia Med. Ctr. of Las Colinas}, 290 S.W.3d 204, 215 (Tex. 2009) (5-4 decision).

\textsuperscript{171} \textit{Id.}; \textit{Martin}, \textit{supra} note 10, at 6.
of new trials.”¹⁷² That holding persisted largely undisturbed until now.¹⁷³

In the fall of 2001, Donald Creech, Jr. was having difficulty with kidney stones.¹⁷⁴ In October of that year, Columbia Medical Center in Las Colinas admitted him for treatment.¹⁷⁵ During his stay, the hospital treated him with intravenous doses of the narcotic Dilaudid.¹⁷⁶ But Donald continued to experience severe pain, so the nurse increased his dosage.¹⁷⁷ A few hours later, Donald died.¹⁷⁸

Donald’s widow, Wendy, sued the hospital and several of its staff for medical malpractice.¹⁷⁹ She claimed that Dilaudid was a respiratory depressant that—combined with Donald’s sleep apnea—caused him to suffocate.¹⁸⁰ At the end of a four-week trial, the jury found for the defendants—but Wendy moved for a new trial arguing that the verdict was against the great weight and preponderance of the evidence; the trial court granted her new-trial motion

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¹⁷³ Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 916 (Tex. 1985) overruled in part by Columbia, 290 S.W.3d at 215.

¹⁷⁴ Columbia, 290 S.W.3d at 216 (O’Neill, J., dissenting).

¹⁷⁵ Id. (O’Neill, J., dissenting).


¹⁷⁷ Id. (O’Neill, J., dissenting).

¹⁷⁸ Id. (O’Neill, J., dissenting).

¹⁷⁹ Id. (O’Neill, J., dissenting).

¹⁸⁰ Id. (O’Neill, J., dissenting).
stating that it was “in the interests of justice and fairness.” The hospital filed a petition for a writ of mandamus with the court of appeals to compel the trial court to specify the reason it granted a new trial, but the court of appeals denied the petition so Columbia filed a similar petition with the supreme court. But before the supreme court could consider the mandamus petition, a new judge replaced the original trial judge and the court abated the case according to appellate procedural rules to allow the new judge to consider the motion. The new judge affirmed the original new-trial order without stating any reasons and the supreme court lifted the abatement and reinstated the mandamus petition on its docket.

On July 3, 2009, the Texas Supreme Court published its opinion, written by Justice Johnson and joined by Justice Hecht and Justice Brister, among others. The opinion began by laying down the two-part Walker test: “Generally, mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law . . . when an adequate remedy by appeal does not exist.” But then the court walked through three examples of exceptional cases. In outlining the first case, the court held that mandamus was preferable to interlocutory appeal in exceptional cases involving clear errors. In reviewing the second case, the court

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181 Id. at 216–17 (O’Neill, J., dissenting).
182 In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 206 (Tex. 2009).
183 TEX. R. APP. P. 7.2(b); Columbia, 290 S.W.3d at 206, 219 (O’Neill, J., dissenting).
184 Columbia, 290 S.W.3d at 206.
185 In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 204 (Tex. 2009).
186 Id. at 207 (internal citations omitted).
187 Id. at 207–09.
188 See id. at 207 (discussing In re Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004)).
recalled that it found a trial court’s refusal to enforce its own order a discretionary abuse with no practical remedy.\textsuperscript{189} And in explaining the third case, the court reiterated that an improper determining venue could be a clear abuse of discretion resulting in irreparable harm.\textsuperscript{190} From this analysis, the court held that “‘exceptional circumstances’ can justify mandamus relief.”\textsuperscript{191}

The supreme court admitted that Texas precedent supported the trial court’s ruling.\textsuperscript{192} And it also recognized that such precedent made the new-trial order unreviewable.\textsuperscript{193} But it held that the traditional inability to review new-trial orders left Columbia without an adequate remedy and therefore created the type of exceptional circumstances mandamus could cure.\textsuperscript{194} The court found that the legislature’s quick repeal of a law allowing appeal from new-trial orders did not reveal a legislative intent to prevent appellate courts from interfering with new-trial orders completely.\textsuperscript{195} It held that the legislature’s view on appealability was not equivalent to the legislature’s view on mandamus.\textsuperscript{196}

The supreme court also showed concern about protecting the right to a jury trial and held that such a concern convinced it that Columbia faced exceptional circumstances.\textsuperscript{197} To bolster

\textsuperscript{189} See id. at 207–08 (discussing In re Barber, 982 S.W.2d 364 (Tex. 1998)).

\textsuperscript{190} See id. at 208 (discussing In re Masonite Corp., 992 S.W.2d 194 (Tex. 1999)).

\textsuperscript{191} In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 208 (Tex. 2009).

\textsuperscript{192} Id.

\textsuperscript{193} Id. at 209.

\textsuperscript{194} Id.

\textsuperscript{195} Id.

\textsuperscript{196} Id.

\textsuperscript{197} In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 209 (Tex. 2009).
that holding, the court compared Columbia’s predicament to the circumstances of the *Prudential* case. The court found that if Columbia lost the second trial it would have to convince an appellate court that the new-trial order created reversible error. And if it won the second trial, it would have endured that second trial without ever knowing why. Therefore, the court held, “[u]nder the circumstances, Columbia does not have an adequate appellate remedy.”

After the supreme court decided that exceptional circumstances existed and Columbia had no adequate remedy on appeal, it turned its attention to whether the trial court abused its discretion. The supreme court held that the discretion to grant new trials was broad, but not limitless. To support that point, it mentioned the two traditional judicial limits placed on granting new trials—void orders, and a mistaken belief that a jury’s answers conflict. And it identified the relevant procedural rules for new-trial motions. The court pointed out that the rules also placed certain limits on a trial court’s discretion to grant a new trial—those limits being “sufficiency or weight of the evidence, when damages are ‘manifestly’ too small or too

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198 *Id.*; *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004).

199 *Columbia*, 290 S.W.3d at 209.

200 *Id.* at 209–10.

201 *Id.* at 210.

202 *Id.*

203 *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 210 (Tex. 2009).

204 *Id.*

205 *TEX. R. CIV. P. 320; TEX. R. CIV. P. 321; TEX. R. CIV. P. 322; TEX. R. CIV. P. 326; Columbia*, 290 S.W.3d at 209.
large, and for ‘good cause.’” Though the court did not try to define “good cause,” it dictated that since the right to a jury trial is so important, a trial judge should not set aside a jury verdict “for less than specific, significant, and proper reasons.” It held that because of the importance of jury trials, the trial court had a duty to the public and the parties to explain why it disregarded a jury verdict. The supreme court noted that an appellate court “must explain with specificity why it has substituted its judgment for that of the trial court” and held that when a trial court withheld the reasons for granting a new trial, it was “no less arbitrary than if an appellate court did so.” It pointed out that more than forty other jurisdictions, as well as the federal courts, required a trial court to specify reasons for setting aside a jury verdict in some situations. Though most jurisdictions imposed the requirement through statute or rule, Idaho first proclaimed it in a court opinion.

The majority discounted the dissent’s argument that supreme court should presume that the trial court granted the new trial based on the grounds specified in the motion. It held that there may have been other reasons and that “the personal and financial inconvenience”

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206 Columbia, 290 S.W.3d at 210.

207 Id. at n.3.

208 Id. at 211.

209 In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 211–12 (Tex. 2009) (citing Maritime Overseas Corp. v. Ellis. 971 S.W.2d 402, 407 (Tex. 1998)).

210 Id. at 212.

211 Id. (citing Quick v. Crane, 727 P.2d 1187, 1199–2000 (Idaho 1986)).

212 Id. at 213.
endured in the jury trial entitled it to know what those reasons were.\textsuperscript{213} The majority also rejected notion that it was “motivated by an underlying fear that some trial courts might abuse the privilege of their discretion.”\textsuperscript{214} It stated that the need for transparency in the judicial system and its “apparent fairness to the public” motivated the court.\textsuperscript{215}

The supreme court concluded that the trial court must “specify the reasons it . . . ordered a new trial as to Columbia. The reasons should be clearly identified and reasonably specific. Broad statements such as ‘in the interest of justice’ are not sufficiently specific.”\textsuperscript{216} The court refused to consider the merits of the trial court’s order but left that door open.\textsuperscript{217} But by interfering in this manner with the trial court’s discretion to control its own proceedings, the supreme court created doubt about the authority and finality of that control.

III. UNCERTAINTY IN THE TRIAL COURT

The Columbia\textsuperscript{218} decision is the result of a steady broadening of mandamus review, which saw the most change in the latter part of the 20th century and the early years of the 21st century. This part looks at the impact of the expanding mandamus landscape. Section A analyzes the exceptional circumstances the supreme court found in Columbia against the backdrop of the supporting authority the court used. Section B examines whether the court overreached when it bypassed legislative intent and the rulemaking process. Section C analyzes

\begin{itemize}
  \item \textsuperscript{213} \textit{Id.}
  \item \textsuperscript{214} \textit{Id.} at 214.
  \item \textsuperscript{215} \textit{In re} Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 214 (Tex. 2009).
  \item \textsuperscript{216} \textit{Id.} at 215.
  \item \textsuperscript{217} \textit{Id.}
  \item \textsuperscript{218} \textit{Id.} at 204.
\end{itemize}
how the court used and superseded precedent to decide the case. And finally, Section D examines the aftermath of the court’s ruling and the impact it might have on litigants, trial courts, and the appellate process.

A. ORDINARY CIRCUMSTANCES

Though the Texas Supreme Court expanded mandamus to cover exceptional circumstances, the practical effect was that the court applied mandamus in circumstances that were really quite ordinary. In her Columbia dissent, Justice O’Neill agreed to Columbia’s assertion that new-trial orders are rare. But the Supreme Court of the United States has disagreed, holding that “such an order is not an uncommon feature of any trial which goes to verdict.” And the long history of new-trial-order mandamus, coupled with the Texas Supreme Court’s decisions on three such cases in one day and at least two more in the intervening few months, supports the idea that new-trial orders are relatively common. Justice Brister, who joined the majority in the Columbia opinion, once wrote that “Texas . . . has from its first year of statehood authorized trial judges to set aside a jury verdict unsupported by the evidence.”

219 Id. at 220 (O’Neill, J., dissenting).


222 Columbia, 290 S.W.3d at 204.

So it would seem that far from being rare or “exceptional,” granting a new trial in Texas is quite an ordinary activity. Describing a mundane trial court action as an exceptional circumstance is counterintuitive and will probably continue to confuse the public, litigants, trial courts, appellate courts, and even the very court that characterized new-trial orders in that way.

The fundamental underpinnings of the exceptional circumstances test are suspect. The concept first appeared in *Canadian Helicopters* as a dictum that “truly extraordinary circumstances” might make mandamus fitting when it otherwise would not be.\(^{224}\) Ironically, the *Canadian Helicopters* court did not use the test and denied mandamus relief.\(^{225}\) To add to the irony, Justice Hecht, who joined the majority in *Columbia*,\(^{226}\) wrote a scathing dissent in *Canadian Helicopters* that expressed deep concern over forcing courts to distinguish between “merely clear” and “super-clear” abuse of discretion.\(^{227}\) Convincingly, he wrote that “the more desirable course would be to avoid snarling mandamus law with new distinctions if at all possible.”\(^{228}\) Clearly, Justice Hecht’s thinking shifted in the intervening fifteen years.\(^{229}\) Such a shift creates doubt that undermines public confidence in the courts.

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\(^{224}\) Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 309 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7) (Vernon 2009).

\(^{225}\) *Id.* at 310.

\(^{226}\) *Columbia*, 290 S.W.3d at 204.

\(^{227}\) *Canadian Helicopters*, 876 S.W.2d at 310–11 (Hecht, J., dissenting).

\(^{228}\) *Canadian Helicopters*, 876 S.W.2d at 311 (Hecht, J., dissenting).

\(^{229}\) Compare *In re* Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 207–09 (Tex. 2009) with *Canadian Helicopters*, 876 S.W.2d at 309 (Hecht, J., dissenting).
To support its argument that exceptional circumstances existed in the *Columbia* case, the court analyzed and applied three prior holdings; but all three cases are inapposite to Columbia’s situation. The first case involved a trial judge’s refusal to grant a motion to quash a jury trial request when the parties had contracted to waive their rights to a jury trial. The *Prudential* court held that to go ahead with a jury trial would force Prudential into an untenable situation. If Prudential won the jury trial, an appeal would be moot, and if it lost the jury trial and got a reversal on appeal, it would have endured unnecessary delay and expense. The *Columbia* court found that Columbia Medical Center would be subjected to the same kind of delay and expense if it won again in the second trial, but if it lost the second trial it would have to clear a very high bar to obtain a reversal based on the new-trial order. Yet, these situations are distinguishable. Columbia had already been through one trial, and to echo Justice Brister’s words as Justice O’Neill did, “[i]f the first jury was correct, then a second can confirm it.” Prudential faced the possibility of *two more trials*—perhaps even a third if the trial court issued a new-trial order in the second. And Prudential contracted with its opponent to avoid a jury trial in

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230 *See Columbia*, 290 S.W.3d at 207–09 (discussing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004); *In re Masonite Corp.*, 997 S.W.2d 194, 199 (Tex. 1999); *In re Barber*, 982 S.W.2d 364, 368 (Tex. 1998)).

231 *Prudential*, 148 S.W.3d at 127.

232 *Id.* at 138.

233 *Id.*

234 *Columbia*, 290 S.W.3d at 209–10.

the first place.  Forcing it to endure a jury trial at the very beginning of the process would create a potentially lengthy proceeding marred at birth by built-in reversible error.  Columbia Medical Center can lay no claim to such an original sin.  The Columbia court’s most substantial argument was that Columbia would lose the benefit of the “first jury verdict without ever knowing why.”  A time-honored cure already exists for that problem: a willingness to presume that a court grants a new-trial motion for the reasons contained in the motion.

The second case the Columbia court used to support its exceptional circumstances holding involved a judge’s refusal to enforce a new-trial order because the judge ruled it void for lack of a valid signature from his predecessor.  The Barber court ruled that the order was not void and compelled the judge to adhere to it.  That situation was merely the logical complement of the long-standing exception that mandamus may issue against a void new-trial order.  In that sense, Barber never presented exceptional circumstances at all, but rather, a


237  *Id.*

238  See generally *Columbia*, 290 S.W.3d at 204–15.

239  *Id.* at 209–10.

240  *Columbia*, 290 S.W.3d at 217 (O’Neill, J., dissenting); Sweeny v. Jarvis, 6 Tex. 36, 44 (1851).

241  See *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex. 2009) (discussing *In re Barber*, 982 S.W.2d 364, 365 (Tex. 1998)).

242  *Barber*, 982 S.W.2d at 368.

243  See *Johnson v. Seventh Court of Appeals*, 350 S.W.2d 330, 331 (Tex. 1961) (holding that mandamus may issue “[w]hen the trial court’s order was wholly void”).
situation well-accounted-for in the void-order exception.\(^{244}\)

Although the Barber court concerned itself with ensuring that the trial court properly executed a new-trial order, the Barber opinion never disclosed whether the original judge stated any reason for granting it.\(^{245}\) And, ironically, the successor judge’s reason for granting the order was simple: the supreme court ordered him to grant it.\(^{246}\) The Barber court’s close examination of the trial court record and affidavits given by the clerk severely undercuts the Columbia court’s position that it cannot presume that the reasons for granting a new trial are apparent from the motion or the court record.\(^{247}\) And finally, like the Prudential case, the Barber case involved a legitimate agreement between parties that the court did not give effect.\(^{248}\) Again, no such agreement or circumstance arose in Columbia.\(^{249}\)

The third case the Columbia court used to show exceptional circumstances involved hundreds of homeowners that sued a manufacturer in two different counties.\(^{250}\) The judge denied proper transfer of venue motions agreed to by the parties and then severed many of the claims

\(^{244}\) Barber, 982 S.W.2d at 368; see also Johnson I, 350 S.W.2d at 331–32.

\(^{245}\) See generally Barber, 982 S.W.2d at 364–68.

\(^{246}\) Id. at 368.

\(^{247}\) Compare In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 213 (Tex. 2009) with In re Barber, 982 S.W.2d 364, 365–66 (Tex. 1998).

\(^{248}\) In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 127 (Tex. 2004); Barber, 982 S.W.2d at 365.

\(^{249}\) See generally Columbia, 290 S.W.3d at 204–15.

\(^{250}\) See Columbia, 290 S.W.3d at 208 (discussing In re Masonite Corp., 997 S.W.2d 194, 195 (Tex. 1999)).
and transferred them to more than a dozen different counties.\textsuperscript{251} The supreme court held that circumstance exceptional because it affected many different courts, plaintiffs, potential jurors, and would cost a great deal.\textsuperscript{252} The \textit{Masonite} court reasoned that the case was different from a normal venue transfer case that affected only one court and “the parties that remain”; but that is precisely what the \textit{Columbia} case would affect: one court and the attendant parties—and that is what makes it so easy to distinguish.\textsuperscript{253} Like \textit{Prudential}, if the \textit{Masonite} court had not intervened, many cases would have made their way to court dead-on-arrival because of their built-in reversible error.\textsuperscript{254}

The \textit{Columbia} court held that the very fact that Texas insulated new-trial orders from interlocutory appeal for so long made the circumstances exceptional.\textsuperscript{255} But Justice O’Neill pointed out that the reason trial courts have broad authority to grant new trials is because they are best suited to observe the trial and its nuances firsthand and assess “whether ‘in the interests of justice and fairness’ a new trial is warranted.”\textsuperscript{256} Justice Brister once argued that new trials are a useful tool for restoring confidence in the courts and in jury trials.\textsuperscript{257} And more than 150 years

\textsuperscript{251} \textit{Masonite}, 997 S.W.2d at 195–96.
\textsuperscript{252} \textit{Id.} at 199.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{See In re Prudential Ins. Co. of Am.}, 148 S.W.3d 124, 127 (Tex. 2004); \textit{Masonite}, 997 S.W.2d at 199.
\textsuperscript{255} \textit{In re Columbia Med. Ctr. of Las Colinas}, 290 S.W.3d 204, 209 (Tex. 2009).
\textsuperscript{256} \textit{Id.} at 216 (O’Neill, J., dissenting).
\textsuperscript{257} \textit{See} Brister, \textit{supra} note 223, at 219–23 (discussing future reforms that may restore confidence in the jury system).
ago, the *Sweeny* court embraced that sentiment when it held that a second trial is generally far more efficient than the first.\(^{258}\) Though the *Sweeny* court cautioned against granting new trials too easily, it held that in a new trial “another opportunity of obtaining justice is afforded.”\(^{259}\) The *Walker* court agreed and found that “the delays and expense of mandamus proceedings may be substantial” and that “[i]t is not enough to show merely the delay, inconvenience or expense of an appeal.”\(^{260}\) Justice O’Neill pointed out that the traditional rule existed to ensure a prompt retrial and this particular case had languished for more than four years during the supreme court’s mandamus “misadventure”.\(^{261}\) Using the *Walker* court’s reasoning, Columbia has an adequate remedy on appeal from the new trial.\(^{262}\) And even combining the *Walker* reasoning with the balancing test from *Prudential*, it is reasonable to assume that the *Walker* court would probably strike the balance on the side of allowing the new trial to go forward unimpeded by mandamus.\(^{263}\)

**B. Bypassing Legislative Intent and Rule-Making**

The *Columbia* court justified its failure to use the rule-making process by asserting that

\(^{258\text{ Sweeny v. Jarvis, 6 Tex. 36, 39 (1851).}}\)

\(^{259\text{ Id. at 40.}}\)

\(^{260\text{ Walker v. Packer, 827 S.W.2d 833, 842–43 (Tex. 1992).}}\)

\(^{261\text{ In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009) (O’Neill, J., dissenting).}}\)

\(^{262\text{ Walker, 827 S.W.2d at 842–43.}}\)

\(^{263\text{ In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004); Walker, 827 S.W.2d at 842–43.}}\)
the judicial decisions created the situation—not the rules of procedure. But the court undermined that proposition because it expended great effort tip-toeing around the meaning of the words “good cause” in Rule 320. It seems much more logical that Rule 320 gives wide latitude to the trial court by design because it allows granting a new trial “for good cause . . . on the court’s own motion.” And while Rule 321 requires any party moving for a new trial to state specific grounds, there is no such requirement placed on the trial court—even when the court grants a new trial on its own motion. So, to the contrary of the Columbia court’s finding, past judicial decisions have placed more limits on the trial court by requiring that when it grants a new trial, it at least does so “in the interest of justice.” Further, the broad discretion allowed by the rules became the very weapon the Columbia court used to beat down the premise that the trial court granted a new trial for reasons Wendy Creech stated in her motion. If the trial court had another reason for granting a new trial, it could have ordered one its own motion—not in response to Creech’s motion.

264 Columbia, 290 S.W.3d at 214.
265 TEX. R. CIV. P. 320; Columbia, 290 S.W.3d at n.3.
266 TEX. R. CIV. P. 320.
267 TEX. R. CIV. P. 321.
268 In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 214 (Tex. 2009).
269 Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 916 (Tex. 1985) overruled in part by Columbia, 290 S.W.3d at 215.
270 See, e.g., Columbia, 290 S.W.3d at 213; In re Bayerische Motoren Werke, AG, 8 S.W.3d 326, 327 (Tex. 2000) (Hecht, J., dissenting).
271 TEX. R. CIV. P. 320.
Presumably, the supreme court can revise the rules of procedure whenever it likes and given the supreme court’s disdain for “legislative expansion of interlocutory appeals” a rule change would seem to be in order. Justice O’Neill agreed and in her Columbia dissent she wrote that “it would be far more appropriate to . . . amend[] the rules rather than implement[] new law on mandamus.” She argued that “declaring such a rule by judicial fiat on interlocutory review, and issuing mandamus relief against the trial court for not following it, turns our mandamus jurisprudence on its head.” The Payne court followed a more cautious approach than the Columbia court. Justice Hecht, writing for the majority in Payne, held that changes to jury charge rules were preferable to imposing new procedure through a court holding because “we do not revise our rules by opinion.” Nine years later in Lehmann v. Har-Con Corporation, he reinforced that principle with regard to the final judgment rule when he wrote, “[W]e do not write rules by opinion.” He even criticized Justice Baker’s concurring opinion in Lehman because it proposed that a trial court should accompany an order on a summary judgment motion with detailed explanations for granting or denying the motion.

273 Columbia, 290 S.W.3d at 218 (O’Neill, J., dissenting).
276 Id.
277 39 S.W.3d 191 (Tex. 2001).
279 Id. at 207.
The Columbia court admitted that the 1927 legislature repealed a 1925 law allowing interlocutory appeal from new-trial orders. But the court held that the legislature’s view on the appealability of new-trial orders does not express the legislature’s view on mandamus of those orders. Still, as Justice O’Neill pointed out—and the majority opinion ignored—the current state of affairs is that “the Legislature has only seen fit to impose such a requirement in criminal cases.” And Justice Hecht admitted that the legislature repealed the 1925 law because it decided “that too many meritless appeals were being taken solely for delay.” The supreme court has held that “a court must give effect to legislative intent.” And it has held that the repeal of a statute without a saving clause indicates the intent of the legislature to eliminate the right granted in the statute immediately. While the repeal of a statute may not be conclusive of a legislative intent to restrict or eliminate a right, it provides no support for those advocating for that right.

C. OVERRULING PRECEDENT

Allowing a trial court to order a new trial “in the interest of justice and fairness” has been the law in Texas for at least twenty-five years and the law has given broad discretion to Texas

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280 In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 209, n.1–2 (Tex. 2009).

281 Id. at 209.

282 Id. at 215 (O’Neill, J., dissenting).

283 In re Bayerische Motoren Werke, AG, 8 S.W.3d 326, 328 (Tex. 2000) (Hecht, J. dissenting).


285 PPG Indus., Inc. v. JMB/Houston Ctrs. Ltd. P’ship, 146 S.W.3d 79, 103 (Tex. 2004).
trial courts to grant new trials for at least 150 years.\textsuperscript{286} But the \textit{Columbia} court vitiated that law as well as the presumption that the reasons for granting a new trial appear on the face of the motion or in the trial court record.\textsuperscript{287} The \textit{Columbia} court stated that one of its main reasons for overturning the precedent was that appellate courts must explain in detail the reasons they substitute their judgment for the judgment of the trial court.\textsuperscript{288} But the necessity for such detail comes from the fact that all an appeals court has to look at is the “cold record.”\textsuperscript{289} The \textit{Columbia} court easily discarded any presumption that the trial court granted the new trial based on points specified in the plaintiff’s motion, but there is strong precedent that supports such a presumption.\textsuperscript{290}

In the past, when the supreme court overruled precedent, it applied the new rule of law prospectively without affecting cases already docketed in the courts.\textsuperscript{291} For example, in \textit{Smith Barney}, the court held that “[t]he district court did not abuse its discretion in following [precedent], and therefore we will not compel the district court to set aside its decision.”\textsuperscript{292}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{286} Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) overruled in part by \textit{In re Columbia Med. Ctr. of Las Colinas}, 290 S.W.3d 204, 215 (Tex. 2009); Sweeny v. Jarvis, 6 Tex. 36, 43 (1851).
\item \textsuperscript{287} \textit{Columbia}, 290 S.W.3d at 215; \textit{but see Sweeny}, 6 Tex. at 43.
\item \textsuperscript{288} \textit{Columbia}, 290 S.W.3d at 206, 211.
\item \textsuperscript{289} \textit{Columbia}, 290 S.W.3d at 220 (O’Neill, J., dissenting).
\item \textsuperscript{290} \textit{Id.} at 213; Wright v. Swayne, 140 S.W. 221, 224 (Tex. 1911); \textit{Sweeny}, 6 Tex. at 43.
\item \textsuperscript{291} \textit{In re Smith Barney, Inc.}, 975 S.W.2d 593, 598 (Tex. 1998).
\item \textsuperscript{292} \textit{Id.}
\end{enumerate}
\end{footnotesize}
recent effects of the *Columbia* decision demonstrate the reason for this approach.\textsuperscript{293} In April 2009, the Beaumont Court of Appeals rejected a petition for a writ of mandamus that requested relief because the trial court granted a new trial “in the interest of justice and fairness.”\textsuperscript{294} But in January 2010, the Texas Supreme Court granted, relying on the *Columbia* decision, a petition for a writ of mandamus asking for relief on the same grounds in the same case.\textsuperscript{295} How many cases remain in the pipeline that will receive this same kind of treatment is anyone’s guess. But it now seems that those cases will be subjected to continued expense and delay.

In overruling this long line of precedent, the *Columbia* court ignored the normal rules for overturning precedent.\textsuperscript{296} Justice O’Neill argued that the court should overturn precedent only for compelling reasons “such as when the preceding decision itself was incorrect or unconstitutional, there is conflicting precedent, the decision has been undercut by the passage of time, the precedent created inconsistency and confusion, or the decision consistently creates unjust results.”\textsuperscript{297} Justice O’Neill argued that none of those conditions existed in the *Columbia*

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\textsuperscript{294} United Scaffolding, 287 S.W.3d at 275.
\textsuperscript{295} United Scaffolding, 2010 WL 144019, at *4 (citing In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 213 (Tex. 2009)).
\textsuperscript{296} Columbia, 290 S.W.3d at 218 (O’Neill, J., dissenting).
\end{footnotesize}
case. She also argued that abuse of discretion only occurs when the trial court acts in an arbitrary or capricious manner in contravention of law and since the trial court adhered to “one of our most well-established legal principles” it could not possibly have committed an abuse of discretion.

The Columbia court pointed to other jurisdictions that required a judge to state specific reasons for a new-trial order. But most of those states embodied that requirement in a form the court eschewed: statute or procedural rule. And the court surreptitiously skipped over the fact, revealed by Justice O’Neill’s dissent, that the vast majority of those jurisdictions modeled their rules after the federal rules and required a specific explanation from a trial judge only when a new trial is ordered on the trial judge’s own motion—not on a party’s motion. The Columbia court could point only to a single case in a single jurisdiction where judicial opinion imposed this requirement. But tellingly, the Columbia court failed to mention that the Idaho Supreme Court required trial courts to state reasons for new-trial rulings only if “those reasons [were] obvious from the record itself.” To admit that would undercut the argument that the

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298 Columbia, 290 S.W.3d at 218 (O’Neill, J., dissenting).

299 Id. at 215, 218 (O’Neill, J., dissenting).

300 Columbia, 290 S.W.3d 204, 212, n.4.


302 FED. R. CIV. P. 59(d); Columbia, 290 S.W.3d at 217, n.4 (O’Neill, J., dissenting).

303 Columbia, 290 S.W.3d at 212 (citing Quick v. Crane, 727 P.2d 1187, 1199–1200 (Idaho 1986)).

304 Id.; Quick, 727 P.2d at 1200 (Idaho 1986) (emphasis added).
court cannot presume the reason a trial court granted a new-trial motion. Idaho has since embodied the requirement to explain new-trial orders in a rule modeled after Federal Rule 59(d) but it, like the federal rule, requires a trial court to explain its reasons only when it grants a new trial on its own motion.

D. AFTERMATH AND IMPLICATIONS

This section examines additional trial court rulings that could be subjected to mandamus under the exceptional circumstances test and uncovers serious issues with the practical impact of that test. This section also explores the added complexity the test creates and uncovers questions about what standards of review might be applied upon mandamus review. Finally, it analyzes cases decided after Columbia, and the confusion and uncertainty they reveal.

Justice Hecht’s concerns, expressed in the dissent he wrote for Canadian Helicopters, have now come full circle. Justice O’Neill voiced those concerns again in her dissent to the Columbia decision when she wrote, “After today, I see no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory ruling.” Writing for the majority in Lehmann v. Har-Con Corporation, Justice Hecht stated that “the

305 Contra Columbia, 290 S.W.3d at 213.

306 FED. R. CIV. P. 59(d); IDAHO R. CIV. P. 59(d).

307 See Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 310–11 (Tex. 1994) (Hecht, J., dissenting) (expressing the fear that the court could apply mandamus in any circumstances it found extraordinary).


general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment.”\(^310\) As Justice O’Neill argued in the *Columbia* dissent, a whole host of incidental trial court rulings may now be subject to the review of appellate courts—thus circumventing the final-judgment principle stated by Justice Hecht in *Lehmann*.\(^311\) Justice O’Neill’s list included: “why the court impaneled jurors who were challenged for cause, granted or denied a motion for summary judgment, allowed or disallowed particular discovery, exercised its gate-keeping function as it did with regard to a key expert witness, or admitted or excluded potentially dispositive evidence.”\(^312\) But there are others.

Additional orders that might now be subject to mandamus include mistrial, continuance, severance, summary judgment, and reinstatement orders. The El Paso Court of Appeals linked mandamus for mistrial orders mandamus for to new-trial orders.\(^313\) If mandamus issued for a mistrial declared after the jury handed down a verdict, then the situation would be analogous to a new-trial order.\(^314\) But if the jury had not yet reached a verdict, it would be hard to imagine what could be accomplished by requiring a trial judge to state the reasons for declaring a mistrial once the trial court dismissed the jury. Similarly, the *Sweeny* court equated the damage done by an improperly granted continuance to that of an improperly granted new trial.\(^315\) Ironically, an ambitious litigant could, during a continuance, conceivably petition for a writ of mandamus that


\(^311\) *Columbia*, 290 S.W.3d at 216 (O’Neill, J., dissenting); *Lehmann*, 39 S.W.3d at 195.

\(^312\) *Columbia*, 290 S.W.3d at 216 (O’Neill, J., dissenting).


\(^314\) *Id.*

\(^315\) *Sweeny* v. Jarvis, 6 Tex. 36, 40 (1851).
would have the practical effect of continuing the continuance. And based on the time it took the supreme court to decide the Columbia and Baylor cases, that could take a very long time.\textsuperscript{316} Similar to new-trial orders, severance claims generally escape mandamus review.\textsuperscript{317} But under the new mandamus tests, a court might consider a desire to sever an exceptional circumstance in need of mandamus review. At least one litigant has successfully attacked a summary judgment ruling through mandamus—although related only to the adequacy of expert reports in a medical malpractice action.\textsuperscript{318} But it is not a long trip from there to where Justice Hecht, in Lehmann, feared the court might go.\textsuperscript{319} And litigants have used mandamus successfully to compel a judge to set aside a reinstatement order.\textsuperscript{320} Can a requirement for detailed reasons from the trial court for reinstatement orders be far behind?

When the supreme court introduced the exceptional circumstances test, it only created more uncertainty. Justice Hecht’s concurrence in Lane Bank Equipment Company v. Smith Southern Equipment, Incorporated\textsuperscript{321} embodies an admirable, yet increasingly unattainable goal.

\textsuperscript{316} See In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 216 (Tex. 2009) (O’Neill, J., dissenting) (observing that it had been four-and-one-half years since the new trial ruling); see also In re Baylor Med. Ctr. At Garland, 280 S.W.3d 227, 228 (Tex. 2008) (observing that the case had been on review for more than three years).


\textsuperscript{318} In re McAllen Med. Ctr., Inc, 275 S.W.3d 458, 466–67 (Tex. 2008).


\textsuperscript{320} General Motors Corp., Chevrolet Div. v. Lane, 496 S.W.2d 533, 535 (Tex. 1973).

\textsuperscript{321} 10 S.W.3d 308 (Tex. 2000).
He wrote, “Appellate procedure should not be tricky. It should be simple, it should be certain, it should make sense, and it should facilitate consideration of the parties’ arguments on the merits.” But Justice O’Neill raised some very troubling questions when she asked what type of review the court might use on the reasons a trial judge gives for a new-trial order. She expressed a deep concern that the majority opened the door to evidentiary review, which had only traditionally been available after a final judgment, and she worried that the ruling would cause “more frequent appellate intervention and delay.” Among the more disquieting questions she asked: what would happen if the reason given was based on personal observations of the jury and how would appellate courts treat that? Also disturbing is the manner in which the supreme court would treat insufficiency-of-the-evidence or against-the-great-weight issues since the Texas Constitution bars the supreme court from considering such questions. Would it then have to remand the case to a court of appeals to consider and therefore create even more delay? All these questions go unanswered by the Columbia opinion, but there is an ominous foreshadowing in the supreme court’s reference to the Fifth Circuit and its holding that courts must give “careful scrutiny” to new-trial orders.

324 Id. at 219 (O’Neill, J., dissenting).
325 Id. at 220 (O’Neill, J., dissenting).
326 TEX. CONST. art V, § 6.
327 Columbia, 290 S.W.3d at 212 (quoting Scott v. Monsanto Co., 868 F.2d 786, 791 (5th Cir. 1989)).
In the relatively short time since the *Columbia* court rendered its decision, evidence has developed that practitioners, and even courts, remain confused about how the *Columbia* holding works. In a brief filed for a case that was still pending as of this writing, the advocate conflated the *Columbia* ruling as relating to *both granting and rescinding* new-trial motions.\(^{328}\) In one case, the parties submitted briefs before the *Columbia* holding, but the court of appeals granted mandamus afterwards.\(^{329}\) In another case decided after *Columbia*, the opinion made no mention of the trial court’s reasons for granting a new trial, but stated that a new-trial order was “not reviewable on appeal.”\(^{330}\) And the *United Scaffolding* cases in the court of appeals and the supreme court straddled the *Columbia* decision and reached different results.\(^{331}\) Are the interests of justice truly served by these confusing and *exceptional circumstances*?

The one trial court that seems to have passed muster under *Columbia* granted a new trial “due to the overwhelming weight of the evidence.”\(^{332}\) This one little nugget may be the first clue

\(^{328}\) *See* Relator’s Reply to Response to Petition for Writ of Mandamus at 5, *In re* Hidalgo, No. 09-0414 (Tex. filed Sept. 4, 2009).

\(^{329}\) *In re* Carrizo Oil & Gas Co., 292 S.W.3d 763 (Tex. App.—Beaumont 2009, no pet. h.) (per curiam).

\(^{330}\) *In re* N.G.K., No. 05-08-00789-CV, 2009 WL 2973665, at *1 (Tex. App.—Dallas Sept. 18, 2009, no pet. h.) (mem. op., not designated for publication).


\(^{332}\) Relators’ Petition for Writ of Mandamus at 8, *In re* Sw. Concrete Prods., L.P., No. 09-0752 (Tex. dismissed Sept. 11, 2009).
into what the supreme court expects. But this tiny incremental trickle of information is like “being stung to death by single bees.” And is “due to the overwhelming weight of the evidence” really the specific reason the Columbia court so desperately wanted litigants to know?

CONCLUSION

The Texas Supreme Court should go back to the drawing board and use the rule-making process to require trial courts to state reasonably specific reasons for granting a new trial. In trying to account for exceptional circumstances, the Columbia court has actually created exceptional circumstances by applying an extraordinary remedy to an ordinary situation. Though the court made a good case for the need to require trial courts to specify their reasons for granting new trials drafting a new rule would be a far more efficient way to achieve the ends the court desires. Such an approach would put parties and trial judges on notice before they have to endure the agonizing delays and doubts created by mandamus petitions. And any new rule “should be clearly identified and reasonably specific” about which reasons an appellate court must accept. A failure to give clear guidance in the new rule would likely create the same kind of situation that now faces litigants and the courts—a tedious and costly process of determining adequate reasons for granting a new trial, inch-by-inch and ruling-by-ruling.

The Columbia court clearly felt strongly that the lack of an appellate remedy justified mandamus for Columbia Medical Center. But mandamus is not a remedy of right—so

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333 CHARLES DICKENS, BLEAK HOUSE 50 (Bradbury & Evans 1853).


335 Id. at 215.

336 Id. at 210.
parties that depend on mandamus as a cure in exceptional circumstances may, ironically, find themselves without an adequate remedy on appeal. The possibility of a seemingly endless number of round-trips to the appellate courts to get things right—and the uncertainty involved in attempting to predict what the supreme court wants—defeats the underlying purpose of giving trial courts discretion. A clear and complete new rule would solve that problem.

The *Columbia* court argued that it did not expand mandamus because its mandamus *principles* remained the same. But by intervening in a way it never has, it has—at the very least—expanded the way it applies those principles. So the court’s claim in this regard is a distinction without a difference.

For hundreds of years, courts used mandamus merely to enforce ministerial functions—not to reverse discretionary decisions. But decisions like *Canadian Helicopters* and *Prudential* brought them to the shores of an undiscovered country. With the *Columbia* holding, Texas courts have disembarked onto those shores with no compass, no map, and no guide. “This is the Court of Chancery; . . . there is not an honourable man among its practitioners who would not give—who does not often give—the warning, ‘Suffer any wrong that can be done you, rather than come here!’” The court should avoid the eccentricities that so plagued the equitable courts in Dickens’s England. It should submit the issue of new-trial order review to the deliberative process of rule-making where all concerned can share their thoughts and ideas without enduring a decade of trial, abatement, and mandamus.

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337 *Id.* at 209.

338 *Id.*


340 CHARLES DICKENS, BLEAK HOUSE 2–3 (Bradbury & Evans 1853).