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Supreme Court of Texas.
In re COLUMBIA MEDICAL CENTER OF LAS COLINAS, Subsidiary, L.P. D/B/A Las
Colinas Medical Center, Antonette Conner and Anna Mathew, Relators.
No. 06-0416.

September 27, 2007

Appearances:
R. Brent Cooper, Dallas, Texas.
Ben C. Martin, Dallas, Texas.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 06-0416 In res Columbia Medical Center of Las Colinas and others.

SPEAKER: May it please the Court. Mr. Cooper will present argument for the relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. The issues that are involved in this case are the, I think, far-reaching. The case is not just about Court defendants. This case in fact -- the rulings in this case will go to all types of cases. All types of civil cases: contract, commercial, family law, injunctive, every type of civil law case which is currently being handled in Texas. Also, it's not limited to just defendants. The same rules that would apply in this case would also apply to plaintiffs, interveners, third-party defendants, any party in a civil case. This case was a four-week, complex, hotly-contested medical malpractice case where the jury returned a unanimous verdict. And without stating a reason, the trial court refused to render a judgment, granted a new trial against Las Colinas and the two nurses who were parties to the case. Now, in this case, if Las Colinas and the nurses were parties in the criminal case and a new trial was granted, they would have a right to an appeal. If they were parties in federal court --

JUSTICE O'NEILL: And why is that?

CHIEF JUSTICE JEFFERSON: Why is that? Yeah, why -- I'm sorry, why is that in a criminal case they have a right to appeal?

MR. COOPER: Well, I'm sorry. The state would have the right to appeal --

CHIEF JUSTICE JEFFERSON: Why?

MR. COOPER: Under 41 001-(a)3.

CHIEF JUSTICE JEFFERSON: And what statute gives a right in the civil case?

MR. COOPER: Federal court? No --

CHIEF JUSTICE JEFFERSON: Here.

MR. COOPER: -- here, there is no statute and that's one of the problems that I'm -- point I'm trying to make is, if we were in a criminal case, in Texas, we would have a right.

JUSTICE O'NEILL: You want us to create that right when the legislature has not.

MR. COOPER: Well, we believe that there should be a right to have review whether it's by appeal.

CHIEF JUSTICE JEFFERSON: And have we considered this question before?

MR. COOPER: Well, the Court has addressed the issue of whether or not there can be, for example, an appeal following the final judgment in the Cummins case and said no, you cannot review the earlier order granting a new trial. The Court has -- there have been a couple of dissents on issues of what can be reviewed by mandamus, this Court, in at least two occasions or three occasions In re Lynd and then Johnson v. Fourth Court of Appeals and Johnson v. Seventh Court of Appeals, has held that orders granting motions for a new trial are reviewable in certain circumstances. However, this Court has never really clarified the full scope of review by this Court or by an appellate court where there is an order granting a motion for a new trial. And one of the things we gave the Court a handout, we believe Texas is in the clear majority of states in the United States, 41 of the 50 states allow review of orders granting motions for new trial.

JUSTICE WILLETT: How many states require judges to articulate a reason for granting a new --

MR. COOPER: Four. I believe it is Indiana, Wisconsin, Minnesota, and I will tell you the fourth one is in California. They require -- there could be a reasoned basis for why the trial court has granted the motion for new trial in order for there to be a meaningful appellate review.

CHIEF JUSTICE JEFFERSON: Then in all those cases, the party who is not satisfied with the grant is able to either mandamus or appeal?

MR. COOPER: They're able to either appeal or have review by mandamus. That is correct.

CHIEF JUSTICE JEFFERSON: And how many -- do you have any idea how many trials there are in Texas and how many motions for new trial for that in the state in a given year?

MR. COOPER: We looked, in all honesty, your Honor, to try to find some statistics on that but -- and we could not find any. But this is what we do know. First of, really, I think this issue would only likely apply in cases that are tried to a jury as opposed to cases that are tried to the Court because if the trial judges would make the decision anyway, why would he grant a motion for a new trial saying, "Well, I got my decision wrong." I guess you could. But most often, these cases arise in jury cases. So we're eliminating a large portion of the cases that are tried to the bench. Second, if you look at how many cases are

actually going to trial in front of a jury, it's, you know, I think I saw some statistics maybe 6 percent or something like that, and then you start breaking that down. How many then would involve a motion for a new trial which has been granted? I really don't think that we're throwing open the floodgates to have tons and tons of cases come in on this issue.

JUSTICE MEDINA: Then why is it -- why is it a problem? I mean, that seems to be within the [inaudible] of the trial judge who has heard all the evidence and for whatever reason, based on that judge's experience and listening to that testimony as it was given through the witnesses, this doesn't agree with the jury. And that, I think, doesn't happen very often as you said and therefore, it's probably not a problem that this Court needs to address.

MR. COOPER: Well, this is the reason that it's a problem. First off, we believe there are constitutional rights that are involved. But second, of all the decisions that are involved in a jury trial, and there are many along the way, the judge makes decisions regarding discovery and everything else, the most important decision that's gonna be made in that case is the decision of the jury as far as which party it's going to rule in favor of or rule against. And what we're saying is you can review by mandamus, discovery orders, [inaudible] regarding arbitration, everything else, but we're not gonna let the parties obtain review of the most significant decision in a case. And --

JUSTICE MEDINA: Like we review too many things by mandamus. We don't let the trial judge do his work anymore.

MR. COOPER: Well, I'm sure there's some that would disagree with that, your Honor, but what I'm saying here is the jury's decision is the most important decision in the case. Parties, both sides, and this was a four-week trial, may literally have invested hundreds of thousands of dollars --

JUSTICE MEDINA: Well, that's the risk of litigation.

MR. COOPER: Granted you may lose, but the question is if you exercise your right under Article I Section 15 of the Texas Constitution, to have jury --

CHIEF JUSTICE JEFFERSON: What if we're, instead, just to take away the right of the trial court to grant a motion for new trial? That all cases go up. How -- would that work?

MR. COOPER: Well, we're not asking the Court to do that because --

CHIEF JUSTICE JEFFERSON: What would that do to our system? Why can't we just eliminate the discretion? The jury's verdict stands, come what may, and if you have a complaint, you take it up on appeal, period.

MR. COOPER: Well, there are certain cases where the trial court does grant a new trial, obviously, and where the new trial is proper, whether it's on the sufficiency of the evidence, if it's based upon receipt of improper testimony --

CHIEF JUSTICE JEFFERSON: So if the trial court says, I believe, the evidence to be insufficient to support the verdict, then you would say there's no mandamus review or --

MR. COOPER: No.

CHIEF JUSTICE JEFFERSON: -- or could we review that as well?

MR. COOPER: Well, what we're saying, well obviously there is limited jurisdiction in this Court as far as --

CHIEF JUSTICE JEFFERSON: Could the Court of Appeals --

MR. COOPER: Court of Appeals --

CHIEF JUSTICE JEFFERSON: -- here is the -- the four- week trial and the judge articulates the reason for granting the new trial, says,

in my estimation, having seen all the witnesses and all the evidence, I believe that the evidence is insufficient to support the jury's answer to questions three, four, five, six, and therefore I'm granting a new trial.

MR. COOPER: Correct.

CHIEF JUSTICE JEFFERSON: Would that situation give rise to a review by an appellate court under the arguments you're making today?

MR. COOPER: I believe it should if there were a clear abuse of discretion.

CHIEF JUSTICE JEFFERSON: And -- okay.

MR. COOPER: And again, in this case, for example, the only ground that was raised by the Wind -- I mean by -- I'm sorry. I'm getting two cases, the Creech's, with respect to their new trial, was sufficiency of the evidence. There was a JNOV saying there was no evidence on causation and negligence, and then there was a motion for a new trial which said if there was evidence, it was factually insufficient.

CHIEF JUSTICE JEFFERSON: So, in every trial in which the party against whom the motion for a new trial is granted believes the evidence did support the jury's verdict, then there would be appellate review.

MR. COOPER: Under a clear abuse of discretion.

CHIEF JUSTICE JEFFERSON: There's clear abuse of discretion.

MR. COOPER: Correct. We believe there should. And we believe when you look, for example, at the evidence in this case, there were five experts who testified that there was no causation involved. There were seven experts who said there was no breach of standard of care and the only independent expert in this case, the coroner, said that nothing that Las Colinas did or its nurses did caused Mr. Creech to die. So you had an independent expert working for the government --

JUSTICE O'NEILL: You didn't have all the records, admittedly.

MR. COOPER: Admittedly. But he still, offered that testimony, as well as five experts on causation, seven experts on standard of care, clearly there was more than sufficient evidence to support the jury's verdict.

JUSTICE MEDINA: Well, the large number of experts testifying doesn't necessarily create sufficient evidence.

MR. COOPER: That is true. It's not measured by the number, it's measured by the weight to be given. And that's the problem. The jury heard these. The jury is charged with weighing the evidence and the jury came back 12- 0 saying that we don't believe there was negligence and we don't believe that there was proximate causation with respect to Las Colinas and the two nurses who were sued in this case.

JUSTICE MEDINA: Jury verdicts overturn all the time, either at the Court of Appeals or at some other levels. How is this any different?

MR. COOPER: Because we don't have someone else look at it. That's the difference. And again, if this is reviewed by the Court of Appeals and the Court of Appeals says, the judge, you're correct, that's fine. But we believe there ought to be an ability to obtain a review just like there is for any other decision that's going to be made by the trial judge.

JUSTICE O'NEILL: And why shouldn't the Court of Appeals have had the opportunity in this case?

MR. COOPER: Okay. What happened was the Court of Appeals did have the opportunity.

JUSTICE O'NEILL: No, I understand what happened. But when it came back at the second time --

MR. COOPER: It was the same motion. It was the same order.

JUSTICE O'NEILL: No, it had a plenary power issue that the First Court of Appeals never had the chance to address.

MR. COOPER: Correct. But the issue on whether or not there was the ability to mandamus, an order granting a new trial was still in there. And was there any reason to believe that if we present that same motion to the Dallas Court of Appeals that there's going to be -- I'm sorry --

JUSTICE BRISTER: Wrong case.

MR. COOPER: We're in the wrong case. I'm sorry, that's the second case, Judge. This case was presented to the Dallas Court of Appeals and they did deny it. That's in the [inaudible] case that's --

JUSTICE BRISTER: So -- but sometimes I'm wondering if there might be times when in fact we want a new trial granted for an improper reason. I'm thinking of the case where the jurors awarded $10 million in actual damages and $100,000 in punitive damages and when the newspaper asked the jurors, "Why did you do that?" they say, "We didn't know there was gonna be a second phase of the trial so we put all the punitive damages into the actuals." Now we know for a fact there's big constitutional problems with doing it that way cause there's all kind of things you have to do and instructions you have to give before you give [inaudible]. But of course, the rules say you can't pay any attention to what the jurors say in the newspaper. Don't we want the trial judge granting a new trial in the interest of justice in that circumstance?

MR. COOPER: Well, then the question then though is, is does the evidence support the award that was made by the jury. I mean, I think if we start examining every jury verdict or how they arrived at their conclusions, we may be shocked or surprised. But I don't believe that that is the role of the trial judge to say. I believe that the jury arrived at this decision an improper way because I think under Golden Eagle Archery 327(b) 606(b), we can't do that. I think the decision of the trial judge is this, is the decision that the jury arrived at, is it supported by the evidence?

JUSTICE BRISTER: Now, suppose that the jurors have gone to the newspaper and said, we did this because we didn't like the plaintiff's race, can't pay any attention to that, but don't we want a trial judge granting a motion for new trial in the interest of justice?

MR. COOPER: Well, again, with all due respect, if we're following the rules that are in place, unless we're going to start creating some new exceptions, the sort of the racial bias or prejudice, exception to 327(b) or 606(b), I don't believe that we're allowed to go in through that information. I think the trial judge is there to basically apply the law and say the evidence supports the verdict or the evidence does not support the verdict. I think if we have the trial judge start trying to get into the jurors' minds, and question, well, did they arrive at it the correct way or not the correct way, we're going to probably open up Pandora's Box --

JUSTICE WILLETT: We circle back to a question we talked about earlier, pardon me. About 20 years ago, 1987 is when the legislature enacted appellate review, or authorized, appellate review of new trial, young grants in criminal cases. There have been ten sessions since then and they've yet to extend that to the civil context, then why should we kind of reach out and affirmatively do what they've declined to do for 20 years now?

MR. COOPER: Well, two reasons. First off, this Court has, throughout history going back at least to '61 and a couple times since then has allowed review by mandamus of orders granting new trial in limited circumstances. But number two, and more importantly is, there

are, we believe, important constitutional rights implicated by the parties. And this Court, I believe, even if the legislature has refused to act, has an obligation to see that the parties' constitutional rights are indeed recognized and upheld.

JUSTICE MEDINA: What constitutional rights are you losing?

JUSTICE O'NEILL: Let me just ask you realquick then --

MR. COOPER: Well, first --

CHIEF JUSTICE JEFFERSON: Judge Medina, please.

MR. COOPER: Okay. We believe, first off, there is an implication to the right to a trial by jury. If you can have a jury trial and then the trial judge can set it aside for no reason stated until finally the jury gets a verdict that agrees with him, that is no right to a trial by jury. If the right to a trial by jury depends upon the jury reaching a result that the judge thinks they ought to reach, that is not a right to a trial by jury. Also, we believe that with respect to procedural due process, there are certain rights regarding appellate review. And again, this is the most fundamental important decision that can be rendered in a jury trial which we believe are implicated there --

JUSTICE O'NEILL: How many cases would we have to overrule if we went your way?

MR. COOPER: I don't believe the Court really would have to overrule any of its own cases. There are some appellate court cases which have interpreted, Johnson, a few Johnson cases and the In re Lynd case, as sort of narrowly circumscribing what rights -- of what review rights by mandamus are available in Texas. And so, I think all this Court would have to do is not overrule any of its prior decision, but basically define and clarify particularly for the Courts of Appeals under what standard and under what circumstances, motions, orders granting motions for new trial can be reviewed.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the real parties in interest.

SPEAKER: May it please the Court. Mr. Martin will present argument for the real parties in interest.

ORAL ARGUMENT OF BEN C. MARTIN ON BEHALF OF THE RESPONDENT

MR. MARTIN: May it please the Court. I'd like to address some of the things raised by the Court in Mr. Cooper's argument. I would first like to discuss the question that Justice Brister raises, the $10 million verdict discussion with the newspaper. If the Court were to do what Mr. Cooper wants it to do, then that would be a situation where there may not be, there wouldn't be jury misconduct because there wouldn't be any outside source of information that the jury is using to come up with its verdict. It's simply coming up with a truly improper verdict. The trial court would not have the opportunity to correct that. The Court of Appeals and the Supreme Court could do nothing about it and --

JUSTICE BRISTER: Of course on the other hand, trial judges, if you don't review them, I suppose we're all a creature of our background but I've personally had a case, tried, won for the defendant. The judge sent me a letter afterwards in writing saying then, if you pay the plaintiff $10, 000, I'll deny the new trial. If you don't, I'll grant it. And we didn't pay and he granted it. Now that's it called, I'm

told, additur, which I'm told you can do in Louisiana but there's no question you can't do it in Texas. But in fact, you can do it in Texas because it's not reviewable.

MR. MARTIN: Well -- and, your Honor, with respect to that, I think the important thing, in my mind, the important thing is that there are circumstances that the Court has pointed out where -- I mean the issue being whether or not a trial courts grant of a new trial is reviewable. There are -- and whether or not the trial court must set out all of the bases for his or her opinion, or his or her findings of a new trial. And the truth of the matter is, there are many things such as the newspaper article that aren't gonna show up in the record that may be and that would be a true basis for fairness, a true basis for there to prevent injustice that simply aren't gonna show up in the record. I'm --

JUSTICE BRISTER: Couldn't a trial judge say, look, under the rules, I can't grant a new trial because the jurors say this is what they did. But I want the record to reflect I have read what they've done and in the interest of justice I don't want the Court system to be the laughingstock of the public. And so, I'm granting this not because on the basis of what the juror said but in the interest of justice. Now when you could make up that record and we would then know why you did what you did, what would be wrong with that?

MR. MARTIN: Well, I think that it would be extremely difficult for things that are not in the record to -- in just the cold record, it would be very difficult for the Court, for the trial court to fashion, I guess, findings, conclusions as to why the Court was issuing a new trial. It would be extremely difficult to outline things that aren't in the record. I mean, are we gonna have an evidentiary hearing on what the Court read in the newspaper? Although, it's likely enough that the Court should have granted a new trial. And under those circumstances, if we go to this -- that point --

JUSTICE BRISTER: But I mean what if the shoe is on the other foot and the judge says, I'm granting this new trial because I don't like the plaintiff's race, that's gonna be unreviewable?

MR. MARTIN: If -- let me get the facts straight. So the Court grants a new trial saying that the -- saying that he does not like the plaintiff's race. I must bring out practicality in a certain respect. I don't think that that would probably happen.

JUSTICE BRISTER: I agree.

MR. MARTIN: And when we get back to the practicality of things that there are --

JUSTICE BRISTER: But --

MR. MARTIN: But --

JUSTICE BRISTER: -- you think that has never occurred in American justice?

MR. MARTIN: I don't think that it -- it's probably occurred. It very likely has occurred.

JUSTICE BRISTER: The reason it's not put on the record is because you don't have to. You can do it without saying.

MR. MARTIN: And there would be no way, in my opinion, for -- no, there would be no way that if a jurist was going to make that determination, he's not gonna put it in writing. And that's just something that, you know, maybe an aberration that has to be dealt with. But with respect to the day-to- day operations of the trial court, there were many instances of situations that may not show up in the Court record. Justice Hecht in the --

JUSTICE MEDINA: The trial court has broad discretion to decide a

lot of things and I think that's a good idea and I think that system works. But what is the harm in allowing an immediate review by an appellate court on this type of issue?

MR. MARTIN: You know what, well, I believe that -- okay, in this -- you're talking about an immediate appellate review, in other words a mandamus?

JUSTICE MEDINA: Yes. Correct.

MR. MARTIN: Okay. Well, there -- as I've pointed out, there are things that are not necessarily on the cold face of the record --

JUSTICE MEDINA: I understand that, you needto go through voir dire, the judge is watching the venire members, theirbody language in making decisions on whether or not to grant certain strikes. I understand that. [inaudible]

MR. MARTIN: Exactly.

JUSTICE MEDINA: The same thing happens on the witness stand.

MR. MARTIN: And that would be -- I believe, I am answering the Court's question in that, that would be a part of the reason why it wouldn't be good for there to be appellate review because there would be no way that the appellate court could review such a situation. A court reporter doesn't write down that the jurors aren't paying attention. Justice Hecht, for instance, in a dissent back in 2000 in one of these cases, talked about the fact that the trial court does have a lot of discretion to grant new trial.

JUSTICE MEDINA: Which case is that?

MR. MARTIN: It was -- I believe it's the BMW case, either BMW or Volkswagen of 2000.

JUSTICE WILLETT: That's where he also said an order granting a motion for a new trial can be reviewed by mandamus.

MR. MARTIN: I'm sorry, your Honor.

JUSTICE WILLETT: That's where -- Judge Hecht also said that an order granting a motion for a new trial can be reviewed by mandamus in that same BMW dissent --

MR. MARTIN: Well, there is no doubt that Justice Hecht was in a dissenting posture at that point in time. So --

JUSTICE HECHT: Could I ask you about this case? Just a couple of clarifying things. You can't tell from the order whether the judge was granting your motion or granting his own motion or both, and what's your position on that?

MR. MARTIN: Well, I don't know that, the court has ever, if the Court -- if the trial court is granting a new trial on another basis, he or she can do so.

JUSTICE HECHT: I'm just asking you, what does this, in your view, what does this order do? Does it rule on your motion? Does it do what he -- what the trial judge could do on his own or both?

MR. MARTIN: All right. I -- you know, because the law is that he can on his own grant a new trial, I don't think that there is any way, based upon the existence of law now and I believe as it should be, that to be able to determine that there were not other reasons that the Court may have granted a new trial other than what we had included in our motion.

JUSTICE HECHT: This is not a trick question.

MR. MARTIN: No.

JUSTICE HECHT: I'm just asking you, with this order --

MR. MARTIN: Sure.

JUSTICE HECHT: -- it's not clear to me when I read it. He says the motion for new trial is granted and orders a new trial and do in the interest of justice and fairness. And so, I'm unclear what your

position is on whether he was just granting your motion or he was also granting a new trial on his own motion --

MR. MARTIN: Sure.

JUSTICE HECHT: -- as he has the right to do.

MR. MARTIN: Your Honor, I believe that the truth of the matter is, I can't give the Court an answer because I don't know. I don't think that -- and the Court points out, if you look at the order, he may have granted it on his own. He may have granted it on the basis of what we had asked for. So, I'm not trying to dodge the question. The answer is, I don't know.

JUSTICE JOHNSON: Counsel, what -- it seems like there might be a problem if -- say you got a judgment for $10 million and the trial court grants a new trial with an order like this and your client says, "How can he do that? Why did he do that?" And you say, I don't know. We try cases. We have court reporter's records, things that happen internally and the judge observes them, but then you might -- you could truly tell your client, he may have gone, he may have gone to Russia and had a conversation with somebody over there for all I know, and that's why you got your 10 million dollars taken away. Now what kind of confidence does that give the public and litigants in our system when you truly have to tell your client that?

MR. MARTIN: Well, it's a tough conversation to have. I can assure the Court I haven't had it --

JUSTICE JOHNSON: On both sides, it didn't matter --

MR. MARTIN: Sure.

JUSTICE JOHNSON: -- whether there's an intervener, a plaintiff, a defendant. But the lawyer has to say, I cannot tell you why that judge did that. Now --

MR. MARTIN: Yes.

JUSTICE JOHNSON: -- what's the downside to simply having the judge say, the things I observed in the courtroom make me convinced that this trial -- this case needs to be tried over again, at least, you know, it's tough to review that, I understand that. But at least you can tell your client, the judge, based upon something that happened in trial as opposed to something that he dreamed at night, he took your $10 million away.

MR. MARTIN: Well, I believe --

JUSTICE JOHNSON: [inaudible] outside of that.

MR. MARTIN: -- yes, your Honor. I believe you'd have to tell the Court -- tell the client that we don't always know exactly and maybe that it would create a very difficult, very, maybe, impossible situation for the Court if he does do that to outline that he -- there were jurors that weren't paying attention, or that something had occured -- unfortunately, the Court is --

JUSTICE JOHNSON: So, you're gonna tell -- so, what we do as lawyers, we explain to the public in general that someone can take away your $10 million verdict and can't explain why.

MR. MARTIN: Your Honor --

JUSTICE JOHNSON: We make our Court of Appeals say if they're gonna overrule on their -- for factual sufficiency, we make them set it out that, we make everybody else do it, but we can say a trial judge can take away your $10 million, no clue, and we don't, as lawyers, think that's a bad idea.

MR. MARTIN: Well, I must say that in this particular -- I have to talk to the Court in those terms as to this particular case because I don't want to forget -- to point out to the Court and I don't want the Court to forget itself that we are dealing with the situation where

this Court was acting in its discretion as the law did exist back when this occurred and as the law still exists. So, in my particular case, the widow who sued in this case and her family should have been able to rely on what the Court did and the Court should have been, and by the way Judge Hartman, Dean -- dean of, I think arguably, Dean of the trial lawyers in Dallas, Texas for over 20 years. He is retired now, and the practicality or impracticality of -- if what I guess Mr. Cooper would want is the Court to create a new common law, even though there's a statutory law that seems to be contra, or rules of procedures that seems to be contra, so that the trial court would to then get the case back, make determinations as to the reasons why the Court granted the new trial, and we've got a retired judge. So I do want to mention that in this particular case, it would be unfair if the Court were to change the law that existed for, now, 150 years --

JUSTICE JOHNSON: I understand [inaudible].

MR. MARTIN: If the Court were to do that, then it shouldn't do it in this case or to Ms. Creech or her family. And I don't know if I'm answering the Court's question really, but you know, it's a tough conversation to have with the client whether you're a plaintiff or you're a defendant who has a new trial granted against you but, you know, --

JUSTICE JOHNSON: I understand you're here advocating for your client's position --

MR. MARTIN: Sure.

JUSTICE JOHNSON: -- and as you should be, but we have a little more -- at issue here than the one case. We have the system in issue, and I appreciate your position and it might -- could be difficult. But --

MR. MARTIN: Well, I can -- I mean, I can address -- I can address the reasons why. I believe that the law should remain the same. That the -- first of all, the criminal statute -- if the legislator had wanted to change or if the Supreme Court had wanted to change by rule of procedure, there are procedures to do that. I want to point out --

JUSTICE HECHT: Can I ask you one -- another question?

MR. MARTIN: Yes.

JUSTICE HECHT: You move for a new trial on the basis of insufficiency of the evidence.

MR. MARTIN: Yes, your Honor.

JUSTICE HECHT: And if the new trial had not been granted and the case has gone up on appeal, and someone had argued the insufficiency of the evidence -- you had argue the insuffiency of the evidence --

MR. MARTIN: Yes, sir.

JUSTICE HECHT: -- and the Court of Appeals says, well, we think that's right.

MR. MARTIN: That Court of Appeals says, we think that's right?

JUSTICE HECHT: Yeah. We would make them explain why they thought that. Why should the law be that the Court of Appeals has to explain why the evidence is insufficient but not the trial judge?

MR. MARTIN: Because and I will point to -- a couple of jurists of the Supreme Court who had spoken -- of the Supreme Court who had spoken, Justice John Hill, of late, Justice Hill put it, I think, pretty perfectly, that the trial court has had the benefit observing the conduct and demeanor of the witnesses and parties, the judge who has conducted the trial of this case is in the best position to evaluate the extent to which improper factors may have unduly influenced the jury's award. And that would be my answer.

JUSTICE HECHT: I fully agree with that, but we make the Court of

Appeals say, why shouldn't the trial judge who was there on the spot, saw it all, just to have to give a reason?

MR. MARTIN: Some things are difficult. I mean it's just the way it is, I believe, your Honor. Some things are not going to be in the record such as something as Justice Brister has outlined today. Some things are simply impossible. His Honor, same thing his Honor pointed out in his dissent in BMW that in certain instances, in [inaudible] discretion, the trial court may look at the fact that the jury was inattentive. That it would be impossible to put that in some sort of an order. I believe the jury was inattentive.

JUSTICE WAINWRIGHT: A judge could then simply say that --

MR. MARTIN: Sorry, your Honor.

JUSTICE WAINWRIGHT: -- the trial judge could simply say three jurors are asleep and had been for the last two hours. Very simple.

MR. MARTIN: Well, I might disagree -- that that maybe an instance where it might be simple, but I could point out instances where it wouldn't be so simple to the Court. In our very case, the nurse who doubled the dose of this narcotic Dilaudid, it is shown in the record that she was handed the Physicians' Desk Reference. This is the nurse who had flunked her boards three times and therefore stayed her course as an LVN. And when she was handed the Physicians' Desk Reference on cross-examination, that's shown in the record. What is not shown in the record is the time that -- when asked, please turn to the reference on Dilaudid, Ms. Matthew, the record is not going to reflect the difficulty in her finding the reference, the difficulty in the very drug that she was giving, the minute after minute after minute that the Court waited on her to find the reference. Finally, so -- being so uncomfortable that -- the situation being so uncomfortable that the defense counsel, this will be shown in the record, stood up and objected saying that the plaintiff's counsel should please find the reference for the drug Dilaudid in the Physicians' Desk Reference. Now, what is gonna be shown in the record? What is gonna be shown in the record and how would it be impossible for --

JUSTICE O'NEILL: Let me --

MR. MARTIN: Yes, your Honor.

JUSTICE O'NEILL: -- let me ask you this. We are going down this trail of as though the Court had given no reasons. Isn't the fact that the Court grants your motion in your presumption that the Court granted it on the reasons that you gave in your motion and maybe or maybe not additional reasons by stating in the interest of justice. But if you say in your motion, for example, that the ME's diagnosis was unreliable, then can't we presume, if he granted your motion, that could be a basis to support the grant. And perhaps, in viewing a witness on the stand, would say, "Gosh. You know what? That really is not a reliable witness. I shouldn't have let him in the first place. New trial." Why are we presuming that there were no grounds stated?

MR. MARTIN: Your Honor, you bring up a point that I was going to get to and I should have gotten to it when I guess it was Justice Hecht who brought it up. But yes, there should be a presumption for whatever is contained within the motion for new trial, assuming that it's within the rules of bringing the motion.

JUSTICE O'NEILL: A motion for summary judgment would require the Court to state what grounds the summary judgment is being granted on.

MR. MARTIN: That's exactly true. And then the Court, as my recollection of the rules is, the Court goes back to see if the party against whom or party for whom the motion has been granted has raised each and every element of --

JUSTICE O'NEILL: Even if a trial court on a motion for summary judgment says, I'm granting it on ground two of eight, the appellate court, still, if they think ground two of eight is wrong, has to look at all the other reasons. So, it would seem to me that the Court would have to look at every ground that was raised in the motion and say the trial court would have been wrong on everyone.

MR. MARTIN: You know what? You handle the case and you think that you've come up with all of the reasons why the Court should do something or not do something, I must still, Justice O'Neill, I didn't come up with that. But you know what? It makes absolute sense that I wish I had.

JUSTICE HECHT: Well, I want to be clear about that 'cause your motion is about 50 words long.

MR. MARTIN: About what?

JUSTICE HECHT: Fifty words long.

MR. MARTIN: Uh-huh.

JUSTICE HECHT: The part about the new trial.

MR. MARTIN: I tried to be brief.

JUSTICE HECHT: Yeah, and -- and -- but you think that the trial judge should have been presumed to have ruled on that and nothing else?

MR. MARTIN: No, I'm not saying -- I'm saying, he should be able to be presumed to have ruled on that, but not only presumed to have been able to rule on that given that the fact that the trial court can grant a new trial on its own, on its own motion, on its own grounds. Your Honor, there is a rule of procedure that outlines that the Court can grant a new trial on grounds of good cause. I believe that that -- I believe that when the Court grants a new trial in this case and outlines that he did it in terms of fairness and in terms of justice, that that is consistent with the rule itself that says the trial court may grant a new trial on grounds of good cause.

CHIEF JUSTICE JEFFERSON: Thank you. Thank you, Mr. Martin. Are there any other questions? Thank you. We will hear rebuttal.

MR. MARTIN: Thank you.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: The count-- trial court may grant a motion upon good cause, but if he is doing it, he ought to state it. In this case he didn't do it. He stated in this motion, ordered granting a new trial that he was granting the plaintiff's motion for a new trial.

JUSTICE JOHNSON: Counsel, how do we handle the opposing counsel's discussion of having a retired judge, if we were to remand for the trial court to state the reasons whatever they were? How do we deal with his problem?

MR. COOPER: Well, I think the only thing that we would be able to do would be to have the new judge reconsider the motion in whether or not there was evidence sufficient to support the jury's verdict.

CHIEF JUSTICE JEFFERSON: Let me ask this. What if it's the same judge, the judge who tried the case and we remanded and we asked the judge to state the reason and the judge's reason is, as Justice Johnson stated a few months ago, things I observed at the courthouse during the trial convinced me that this case ought to be tried again. What if that's the reason stated for granting a new trial?

MR. COOPER: Well, again I believe that in order for that to be a

basis, the judge ought to be required to state what he observed so that there could be --

CHIEF JUSTICE JEFFERSON: Okay, then what if the judge states the reason I granted the new trial is because when I observed the witnesses giving testimony, it seemed to me that they were dissimulating, that they were not -- that their eyes were shifting, that they were stuttering, that they didn't get to the drug in the diagnostic book in time. If that's the comment that the judge makes, that's subject to abuse of discretion too.

MR. COOPER: Well, if that's the reason, I've got a problem with that reason as far as setting aside the jury's verdict because in a jury trial, the jury is the judge of the credibility of the witnesses --

CHIEF JUSTICE JEFFERSON: Can we do away with peremptory strikes?

MR. COOPER: We'll shift -- let's shift our focus for a second. Should we do away with peremptory strikes? I don't think so because sometimes lawyers --

CHIEF JUSTICE JEFFERSON: Should the lawyer have to articulate the reason for exercising peremptory strike?

MR. COOPER: Well, under certain circumstances, the lawyer does have to articulate the reason.

CHIEF JUSTICE JEFFERSON: Not based on race, not on a Batson, but it's just the way you look, just what we've said is pretty much okay.

MR. COOPER: We don't have that, I think, unless it is somebody figures that it was based on race or sex, or some other prohibited category.

CHIEF JUSTICE JEFFERSON: But should we have something like that here? If there is some indication of some prohibited discriminatory reason for the trial court to grant a new trial, then we compel the judge to articulate the basis for granting a new trial. But if there is not one, then we respect the fact that the judges here are elected in Texas, have a job to do, and we presume that they're doing it in good faith.

MR. COOPER: I would disagree with that, your Honor, because I believe --

CHIEF JUSTICE JEFFERSON: [inaudible]

MR. COOPER: -- a judge is having to make a decision on issues between two parties. And I believe that if a judge has to articulate the reasons as required at least in four states, there is, first, more accountability. Second, if we are going to have any type of meaningful review on appeal, you must have that articulation, how can -- how is it possible for any party to obtain a review on appeal in the interest of justice and fairness. Nobody knows what was unjust or what was unfair, you don't have it. I believe, again, this is one of the few areas, at least right now, where the trial judge's discretion is pretty much unchecked or unreviewable.

JUSTICE: So what --

JUSTICE O'NEILL: The medical examiner did not review a big piece of the records and gave an opinion that I thought swayed the jury.

MR. COOPER: The medical examiner though did the autopsy. The medical examiner did complete --

JUSTICE O'NEILL: But if I'm the judge and that argument was made, which it was in the new trial motion, that I think that the expert witness got up there and didn't have a basis for his decision, therefore it is unreliable. I really shouldn't have let him in-- new trial.

MR. COOPER: If we are talking about the gatekeeper function of the

Court, that is one thing and I could probably go along with as far as should the witness had testified it all.

JUSTICE O'NEILL: Then how do we --

MR. COOPER: But if we're talking about credibility, the other issue that is was he believable, more believable than the plaintiff's expert, that is --

JUSTICE O'NEILL: How do we know that the trial court didn't view it that way? I mean [inaudible].

MR. COOPER: We don't because there was no articulation that [inaudible].

JUSTICE O'NEILL: But it granted the --

JUSTICE JOHNSON: What standard is it that you want us to impose if we are to remand it? What standard should the trial court have to comply with?

MR. COOPER: What we're asking the Court to do is two things. One is, if the motion for a new trial is going to be granted, that the trial court must articulate the reason that he or she is granting the motion for a new trial. And then second --

JUSTICE JOHNSON: With what degree of specificity?

MR. COOPER: Well, if you go into some of the -- I would think similar to what this Court required in Pool as far as setting forth the specific grounds.

CHIEF JUSTICE JEFFERSON: What if the reason is the jury seemed inattentive?

MR. COOPER: Well, I think that the Court needs to articulate which jurors we need to --

CHIEF JUSTICE JEFFERSON: Jurors one through 12 seemed inattentive.

MR. COOPER: Again, he needs to articulate specifically why they were inattentive when he observed them, and then how that impacted on the ultimate result in this case.

JUSTICE O'NEILL: What if that's the basis for the motion? The motion says jurors three, four, and six were asleep for half a day and the trial court judge says, I'll grant the motion. Why is that not -- why aren't the grounds of the motion a sufficient articulation? Summary judgment, we don't require courts to specify a ground.

MR. COOPER: Well, if he does, if he is granting it on the basis of the motion which uphold the motion for new trial and he said, he, you know, the plaintiff's motion should be granted, I think there can be. The presumption is, as Justice Hecht said, that he was granting it on the basis of factual insufficiency of the evidence, then the question before the Court is, was there factual insufficient of evidence and did he apply the right standard of review?

JUSTICE JOHNSON: What's your second part of your standard?

MR. COOPER: Second part we were asking the Court is that we believe that orders granting motions for a new trial should be reviewable on mandamus under a clear abuse of discretion standard.

CHIEF JUSTICE JEFFERSON: Mr. Cooper, we will return in just a few moments. The Court will take a brief recess. That cause is submitted and we'll see you tomorrow.

SPEAKER: All Rise.

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