NUMBER 13-15-00535-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE PETERSON CONSTRUCTION, INC.

On Petition for Writ of Mandamus

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Perkes
Memorandum Opinion by Chief Justice Valdez[1]

Relator, Peterson Construction, Inc. ("Peterson"), filed a petition for writ of mandamus seeking to compel the trial court to withdraw its order granting a new trial and to enter judgment in Peterson's favor.[2] A jury rendered a verdict against the real party in interest, Roberto Perez, on his premises liability claims against Peterson because it found

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[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case."); TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number C-302-07-C in the 139th District Court of Hidalgo County, Texas. The respondent in this original proceeding is the Honorable Roberto "Bobby" Flores. *See* TEX. R. APP. P. 52.2.

that Peterson's construction superintendent, Orlando Perales, was the borrowed servant of another entity. The trial court granted Perez's motion for new trial on grounds that the evidence supporting the verdict was factually insufficient. Concluding that the trial court acted within his discretion in granting a new trial, we deny the petition for writ of mandamus.

I. BACKGROUND

This is a premises defect case regarding personal injuries sustained by Perez at 601 East Kelly in Pharr, Texas. This premises was utilized by the Pharr-San Juan-Alamo Consolidated School District (the district) for administrative purposes, and the district was constructing a new administration building at that site (the PSJA project). In their fifth amended original petition, Roberto and Norma I. Perez[3] brought suit against Peterson for personal injuries Roberto received on March 2, 2006, when "he placed his hand on a handrail descending a stairway" located at the administration building and then "suddenly and unexpectedly fell from the stairway." He "fell sideways off the stairway, crashed down onto the pavement below, and suffered, among other things, a broken back." According to Perez, the handrail was not properly secured to the stairwell.

Perez was employed as the community liaison for the district and had come to the premises to meet the superintendent to discuss employment matters and community-related issues. Perez asserted that Peterson was in control of the building because it was the "general contractor, superintendent, and/or subcontractors responsible for

[3] Prior to trial, Norma nonsuited all of her claims against the defendants, and Roberto nonsuited his loss of consortium claims. Several other defendants were originally involved in the case and were submitted in the charge for purposes of negligence apportionment: Meridian Consulting Group, Inc., San-Co Steel, Ltd. d/b/a Southern Steel Fabricators Ltd., the City of Pharr, and Lopez & Lopez Architects, Inc. These defendants are not parties to this original proceeding.

construction on the premises" and that Peterson was "hired to oversee completion/construction and/or repair of all items on the punch list" issued by the architects of the building. Perez alleged that Peterson was negligent in constructing, installing, and inspecting the stairway and handrail, and he further asserted that Peterson was negligent in the "hiring, training, and . . . supervision of its employee, Orlando Perales, the on-site superintendent for [the building]."

After a four-day jury trial, the jury found that Perales was not acting as an employee of Peterson at the time of the incident. Specifically, the jury answered "no" to the following question:

> On the occasion in question, was Orlando Perales acting as an employee of Peterson Construction, Inc.?
>
> An "employee" is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result to be accomplished.
>
> An employee ceases to be an employee of his general employer if he becomes the "borrowed employee" of another. One who would otherwise be in the general employment of one employer is a borrowed employee of another employer if such other employer or his agents have the right to direct and control the detail of the particular work inquired about.

The definition of "borrowed employee" in the charge tracks the language of the Texas Pattern Jury Charge and comports with language utilized by the Texas Supreme Court. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002). In accordance with the instructions in the charge, the jury did not answer the remaining questions in the charge regarding the liability of any other party or Perez's alleged damages. Perez thereafter moved for a new trial on grounds that the evidence was legally and factually insufficient to support the jury's finding that Perales was the borrowed employee of another company, namely Meridian Consulting Group, Ltd. (Meridian).

On July 15, 2015, the trial court granted a new trial. The new trial order reads as follows:

> On this date, the Court considered Plaintiff's Motion for New Trial. After considering Plaintiff's Motion, Defendant's Response, the evidence on record, and pleadings on file, and all arguments of counsel, the Court finds that the Motion should be GRANTED.
>
> Specifically, there is factually insufficient evidence to support the Jury's finding that Orlando [Perales] was the borrowed employee of Meridian Consulting. The evidence in the record overwhelmingly supports a finding that Orlando Perales remained the general employee of Defendant, Peterson Construction, Inc. at the time of the incident rather than the borrowed employee of Meridian Consulting. When the evidence in the record is applied to the factors used to determine borrowed employee status, it is apparent the Jury's finding is against the great weight and preponderance of the evidence. *See Lara v. Lile*, 828 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1992, writ denied) (listing factors); *Ortiz v. Furr's Supermarkets*, 26 S.W.3d 646, 652 (Tex. App.—EI Paso 2000, no pet.) (same); *Alaniz v. Galena Park ISD*, 833 S.W.2d 204, 207 (Tex. App.—Houston [14th Dist.) 1992, no writ) (same). Specifically, the evidence at trial was:
>
> (1) Peterson Construction had the authority to hire and fire Mr. Perales, not Meridian.
>
> (2) Peterson Construction was responsible for paying Mr. Perales's wages, not Meridian.
>
> (3) There was no evidence that Meridian owned any of the tools or equipment used by Mr. Perales.
>
> (4) Mr. Perales was a construction superintendent and had extensive experience in this occupation. The record reflects that his primary purpose was to oversee completion of the items on the punch list issued by the architects for the PSJA lSD Administration Building. It is also apparent that Meridian, and the surety, United Fire & Casualty, were interested in the results of the work because Perales sent daily field reports, or progress reports, to Peterson Construction, who then sent the reports to Meridian and presumably shared the progress with the surety.
>
> (5) There was no evidence at trial whether Peterson or Meridian could substitute another employee in place of Mr. Perales, but, as stated

above, Peterson Construction had the authority to hire and fire Mr. Perales.

(6) Mr. Perales was assigned as the superintendent of construction at the PSJA Administration Building until the work was completed.

(7) The record indicates that Mr. Perales was an experienced superintendent who went to the PSJA Administration Building on an almost daily basis, with little or no supervision, and reported the progress of the work to Peterson Construction's office in McAllen, who then forwarded the reports to Meridian in San Antonio.

(8) There was no evidence presented at trial that Meridian maintained Mr. Perales on its Social Security or income-tax withholding records. Presumably, these were maintained by Peterson Construction who was responsible for paying Mr. Perales his wages.

The evidence of Meridian Consulting's control over Orlando Perales is so weak that it does not rise to the level to support the Jury's finding of borrowed employee. The evidence at trial demonstrates that Meridian Consulting and Peterson Construction, through its employee Orlando Perales, participated in necessary cooperation as part of a larger undertaking to complete construction of the PSJA Administration Building. *See Ortiz,* 26 S.W.3d at 652; *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.,* 115 S.W.3d 191, 199 (Tex. App.—Dallas 2003, pet. withdrawn). The evidence in the record is that both Peterson Construction and Meridian were on the same level or "plane" in the organizational chart of this project. Further, the draft agreement between Meridian and Peterson Construction notes that Peterson Construction's relationship is that of an independent contractor, who is responsible for the acts and omissions of its own employees-here, Mr. Perales. There is evidence of necessary cooperation and coordination between the representatives of the two companies, Orlando Perales and Jack Lenhart, but it does not rise to the level of Meridian controlling the details or direction of Mr. Perales work.

For the above reasons, the evidence supporting the Jury's finding of borrowed employee is so against the great weight and preponderance of all the evidence that it is manifestly wrong and unjust. Accordingly, it is hereby ORDERED that this cause be reset for a new trial.

This original proceeding ensued. By two issues, Peterson alleges: (1) the trial court abused its discretion in ordering a new trial based on the factual insufficiency of the evidence because (a) the evidence presented at trial demonstrated Perales was a

borrowed employee; (b) the draft agreement between Peterson and Meridian, cited by the trial court, was insufficient to overcome evidence presented by Peterson; and (c) the trial court simply replaced the opinion of the jury with its own; and (2) the order granting a new trial failed to meet the requirements established by the Texas Supreme Court's opinion in *In re United Scaffolding, Inc.,* 377 S.W.3d 685, 688–89 (Tex. 2012) (orig. proceeding). This Court requested and received a response to the petition for writ of mandamus from Perez and received a reply thereto from Peterson.

II. MANDAMUS

Mandamus is appropriate when the relator demonstrates that the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding); *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). The relator has the burden of establishing both prerequisites to mandamus relief, and this burden is a heavy one. *In re CSX Corp*., 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding).

A trial court clearly abuses its discretion if it reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P*., 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Because this balance depends heavily on circumstances, it must be guided by the analysis of principles rather than the application of simple rules that treat cases as

categories. *In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). We evaluate the benefits and detriments of mandamus review and consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *In re Prudential Ins. Co. of Am*., 148 S.W.3d at 136.

III. REVIEW FOR NEW TRIAL ORDERS

Rule 320 of the Texas Rules of Civil Procedure gives the trial court broad discretion to grant a new trial "for good cause, on motion or on the court's own motion." TEX. R. CIV. P. 320. However, because the Texas Constitution guarantees the right to trial by jury, that authority is not unfettered. *See* TEX. CONST. art. I, § 15; *In re Bent*, No. 14-1006, __ S.W.3d __, __, 2016 WL 1267580, at **3–5 (Tex. Apr. 1, 2016) (orig. proceeding); *see also In re VSDH Vaquero Venture, Ltd.*, No. 05-15-01513-CV, 2016 WL 2621073, at *4 (Tex. App.—Dallas May 6, 2016, orig. proceeding) (mem. op.). The Texas Supreme Court has held that although trial courts have significant discretion in granting new trials, "such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis." *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 212 (Tex. 2009) (orig. proceeding); *see In re United Scaffolding, Inc*., 377 S.W.3dat 688–89. Thus, a trial court's order granting a motion for new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict. *In re Bent*, 2016 WL 1267580, at *1; *In re Columbia Med. Ctr.*, 290 S.W.3d at 213; *see, e.g., In re Hunter*, 306 S.W.3d 422, 423 (Tex. App.—Dallas 2010, orig. proceeding); *In re C.R.S*., 310 S.W.3d 897, 898 (Tex. App.—San Antonio 2010, orig. proceeding); *In re Carrizo Oil & Gas Co.*, 292 S.W.3d 763, 764 (Tex. App.—Beaumont 2009, orig. proceeding). A trial court does not abuse its discretion so long as its stated

reason for granting a new trial is: (1) a reason for which a new trial is legally appropriate, such as a well-defined legal standard or a defect that probably resulted in an improper verdict; and (2) specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand. *In re United Scaffolding, Inc*., 377 S.W.3d at 688–89. A new trial order may be an abuse of discretion if, for example, it is based on a reason that is not legally valid, or "if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's." *Id.* at 689.

Further, an appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial. *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d 746, 758 (Tex. 2013) (orig. proceeding); *see In re Whataburger Rests. LP*, 429 S.W.3d 597, 598 (Tex. 2014) (orig. proceeding) (per curiam); *In re Health Care Unlimited, Inc*., 429 S.W.3d 600, 602 (Tex. 2014) (orig. proceeding) (per curiam). If the articulated reasons are not supported by the law and the record, mandamus relief is appropriate. *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d at 761–62.

We perform a merits-based review of orders granting new trials by mandamus under "the abuse of discretion standard that is familiar and inherent to mandamus proceedings." *In re Bent*, 2016 WL 1267580, at *5.[4] The supreme court has not adopted

[4] In the supreme court's most recent case on mandamus review of new trial orders, it noted that "the parties have inquired as to the court of appeals' authority, within the context of an abuse-of-discretion standard of review, to re-weigh evidence considered by the trial court in determining whether there is insufficient evidence to support a jury's finding or that a finding is against the great weight and preponderance of the evidence." *In re Bent*, No. 14-1006, __ S.W.3d __, __, 2016 WL 1267580, at *1 (Tex. Apr. 1, 2016) (orig. proceeding). The supreme court ultimately did not reach that issue. *See id.* We note that, constitutionally, only the intermediate courts of appeals have jurisdiction to review for factual sufficiency. *See* TEX. CONST. art. V, § 6; *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993). Nevertheless, the supreme Court may determine whether intermediate appellate courts properly follow applicable legal standards of review. *In re C.H.*, 89 S.W.3d at 28; *Jaffe Aircraft Corp.*, 867 S.W.2d at 29.

the Fifth Circuit's approach to merits review of new trial orders; however, it has suggested that "appellate courts are hardly without precedence to guide them." *Id.; see In re Toyota Motor Sales*, *U.S.A., Inc.*, 407 S.W.3d at 759 (discussing *Cruthirds v. RCI, Inc.,* 624 F.2d 632, 635–36 (5th Cir.1980)).

Under Fifth Circuit authority, where the court "chooses to grant a new trial and bases its decision on the weight of the evidence, we must review the record carefully to make certain that the district court has not merely substituted its own judgment for that of the jury." *Cruthirds*, 624 F.2d at 635–36; *see Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 362–63 (5th Cir. 1980). In *Conway*, the Fifth Circuit generally expounded on the standards by which it reviews orders granting new trials:

> The general standard by which we review trial court orders granting new trials is abuse of discretion. Such a standard recognizes the deference that is due the trial court's first-hand experience of the witnesses, their demeanor, the context of the trial, and the like. This deference is especially appropriate where a new trial is denied and the jury's determinations are left undisturbed. Recent cases in our circuit apply a somewhat broader review, however, to orders that [g]rant new trials, mandating the greatest degree of scrutiny where, as apparently here, a new trial is decreed on the ground that the verdict is against the weight of the evidence. We do so to assure that the judge does not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury. In a further effort to avoid such substitutions, we have noted that new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great not merely the greater weight of the evidence. Factors militating against new trials in such cases are simplicity of the issues, the degree to which the evidence was in dispute, and the absence of any pernicious or undesirable occurrence at trial.

610 F.2d at 362–63 (internal citations omitted). "If the issues are complex, the evidence in contention, or the proceedings marred, the new trial order may be affirmed even if on our own review of the cold record we are not convinced that the jury verdict was against

the great weight of the evidence." *Scott v. Monsanto Co*., 868 F.2d 786, 789–90 (5th Cir. 1989) (internal quotations omitted). "The district court's experience and first-hand exposure to the proceedings thus figure into the determination of whether the trial was fair and the jury verdict reliable." *See id.* at 790.

IV. STATED REASONS FOR NEW TRIAL ORDER

In its second issue, which we take out of order, Peterson contends that the trial court failed to meet the strict requirements placed on an order granting a new trial due to factual insufficiency. Peterson alleges that the trial court "simply listed a pro forma list of elements which supposedly could be used to determine the borrowed servant status of [Perales] without citing or referencing a single document or even a line of testimony which supported even one of the eight elements the trial court outlined." Peterson acknowledges that the trial court cited the draft agreement between Meridian and Peterson, but argues that "the court never applied the draft agreement's language to any of the eight elements it outlined."

In this case, the trial court's order recites that the verdict was "against the great weight and preponderance of all of the evidence," which is a legally sound reason to grant a new trial. *See In re United Scaffolding, Inc.*, 377 S.W.3d at 688–89 ("[A]n order granting a new trial may amount to a clear abuse of discretion if the given reason, specific or not, is not one for which a new trial is legally valid."); *see also, e.g., Sanders v. Harder*, 227 S.W.2d 206, 209–10 (Tex. 1950) ("In ordinary civil cases trial courts . . . may set aside jury verdicts and grant new trials when, in their opinion, those findings, though based upon some evidence, are against the great weight and preponderance of the evidence . . . ."). Accordingly, the trial court's order meets the first requirement for orders granting

new trials.

Second, we determine whether the trial court's stated reasons for granting the new trial are specific enough to indicate that the trial court derived the articulated reasons from the particular facts and circumstances of the case at hand. *See id.* The Texas Supreme Court has directed us as follows:

> [M]andamus may lie if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge's reasoning. Usually, the mere recitation of a legal standard, such as a statement that a finding is against the great weight and preponderance of the evidence, will not suffice. The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings. A trial court abuses its discretion if its new-trial order provides no more than a pro forma template rather than the trial judge's analysis.

In re United Scaffolding, Inc., 377 S.W.3d at 689. The new trial order must provide "a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted." *Id.* In the context of new trial orders based on evidentiary insufficiency, trial courts need not furnish the same level of detail in explaining their decisions that courts of appeals[5] must provide. This is because the concerns that exist as to whether the "court of appeals ha[s] 'considered and weighed all the evidence before arriving at a decision of insufficiency' are not present with respect to the trial court, which "has, in most instances, been present and a participant in the entire trial." *In re United Scaffolding*, 377 S.W.3d at 688 (quoting *Pool v. Ford Motor Co*., 715 S.W.2d 629, 635 (Tex.1986) (op. on reh'g)); *see In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d at 764

[5] In *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex.1986), the Texas Supreme Court directed courts of appeals, when reversing verdicts on insufficiency grounds, to detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias, and to "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict." *Id.* at 635.

(Lehrmann, J., concurring). Accordingly, as a reviewing court, we focus "not on the length or detail of the reasons a trial court gives, but on how well those reasons serve the general purpose of assuring the parties that the jury's decision was set aside only after careful thought and for valid reasons." *In re United Scaffolding*, 377 S.W.3d at 688; *see In re Bent*, 2016 WL 1267580, at *4. In urging "quality over quantity," however, the supreme court "did not relieve any trial court of its responsibility to point to evidence that played a pivotal role in its decision." *In re Bent*, 2016 WL 1267580, at *4.

In this case, the new trial order tracks a list of eight factors, as summarized in *Texas Causes of Action,* which have been utilized by Texas courts to determine whether an individual is a borrowed employee.[6] *See* Michol O'Connor, *Texas Causes of Action* 1223 (2016). The order considers the eight factors and ties those factors to the evidence adduced in this case. The trial court specifically considered evidence that: Peterson had

[6] The following is a brief summary of list of factors delineated by O'Connor's *Texas Causes of Action*:

(1) Whether the borrowing employer had the right to hire and fire;

(2) Whether the borrowing employer had the right to select the general employee and was responsible for paying the employee.

(3) Whether the borrowing employer owned the tools or machines used by the general employee.

(4) Whether the employee was expected to operate machinery in the way the borrowing employer directed.

(5) Whether the lending employer could have substituted another employee at any time.

(6) Whether the general employer was borrowed for an indefinite period of time.

(7) Whether the general employee had special skills.

(8) Whether the borrowing employer carried the general employee on Social Security and income-tax withholding records.

See Michol O'Connor, *Texas Causes of Action* 1223 (2016).

the authority to hire and fire Perales; Peterson was responsible for paying Perales's wages; Perales was assigned as the superintendent of construction at the PSJA Administration Building until the work was completed; Perales's primary purpose was to oversee completion of the items on the punch list issued by the architects for the PSJA project; Perales had extensive experience in his occupation and worked on the PSJA project on an almost daily basis, with little or no supervision; and Perales reported the progress of the work to Peterson Construction's office in McAllen, who then forwarded the reports to Meridian in San Antonio.

The trial court examined the lack of evidence on several factors, concluding that there was no evidence that: Meridian owned any of the tools or equipment used by Perales; Peterson or Meridian could substitute another employee in place of Mr. Perales; or Meridian maintained Perales on its social security or income-tax withholding records. The trial court further considered evidence that Peterson and Meridian were on the same level or "plane" in the organizational chart for the PSJA project and considered the import of the draft agreement between Meridian and Peterson, under which Peterson was intended to occupy the status of an independent contractor, and as such, would have been responsible for Perales's acts and omissions of its own employees. The trial court concluded that the evidence regarding Meridian's alleged "control" over Perales amounted to necessary cooperation between the two companies.

The new trial order provides a general rationale for the trial court's ruling and expressly illustrates that the trial judge considered the specific facts and circumstances of the case at hand as indicated in the evidence introduced at trial. Under the *United Scaffolding* analysis, we conclude that the new trial order meets the specificity

requirement established by the supreme court for new trial orders. *See In re Bent*, 2016 WL 1267580, at *4; *In re United Scaffolding*, 377 S.W.3d at 688. Based on the foregoing, we overrule Peterson's second issue.

V. MERITS OF NEW TRIAL ORDER

In its first issue, Peterson contends that the trial court abused its discretion in ordering a new trial based due to a lack of evidence supporting the trial court's order when (a) the evidence presented at trial demonstrated Perales was a borrowed employee; (b) the draft agreement cited by the trial court was insufficient to overcome evidence presented by Peterson; and (c) the trial court simply replaced the opinion of the jury with its own.

A. The Borrowed Servant Doctrine

The determinative issue in this case is whether Perales constituted a borrowed servant. The borrowed-employee doctrine is a tort doctrine that is concerned with vicarious liability and apportionment of responsibility for employees who have more than one master. *Reliance Nat. Indem. Co. v. Advance'd Temporaries, Inc.*, 227 S.W.3d 46, 49 (Tex. 2007); *St. Joseph Hosp.*, 94 S.W.3d at 538. The Texas Supreme Court "has long recognized that a general or regular employee of one employer may become the borrowed employee of another with respect to some activities." *St. Joseph Hosp.*, 94 S.W.3d at 537; *see Sparger v. Worley Hosp., Inc*., 547 S.W.2d 582, 583 (Tex. 1977); *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 225 (Tex. 1963); *Davis-Lynch, Inc. v. Asgard Techs., L.L.C.*, 472 S.W.3d 50, 70 (Tex. App.—Houston [14th Dist.] 2015, no pet.). "[I]t is the shift of the right to direct and control the details of the work that transforms a general employee of one employer into a borrowed employee of another, rendering the

new employer vicariously liable for the borrowed employee's actions." *St. Joseph Hosp*., 94 S.W.3d at 542; *see Painter v. Sandridge Energy, Inc.*, No. 08-13-00272-CV, __ S.W.3d __, __, 2015 WL 6704759, at *8 (Tex. App.—El Paso Nov. 3, 2015, pet. denied); *Dorsey v. Raval*, 480 S.W.3d 10, 19 (Tex. App.—Corpus Christi Aug. 31, 2015, no pet.). If an employee of one employer becomes the borrowed employee of another, he is no longer considered an employee of the general employer for vicarious liability purposes. *St. Joseph Hosp*., 94 S.W.3d at 538. "The right of control is ordinarily a question of fact." *Sparger*, 547 S.W.2d at 583; *see Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 847 (Tex. App.—Fort Worth 2006, no pet.).

We consider several factors regarding application of the borrowed servant doctrine. *See St. Joseph Hosp.*, 94 S.W.3d at 541. "Paramount among those factors, however, is whether the person being held responsible can be said to have had a right to control the activities of the wrongdoer." *Id.* The right to control an employee is the "supreme test," *id.* at 543, or the "essential inquiry." *Davis-Lynch, Inc.*, 472 S.W.3d at 70; *Alaniz v. Galena Park Indep. Sch. Dist*., 833 S.W.2d 204, 206–07 (Tex. App.—Houston [14th Dist.] 1992, no writ). The employer that has the right to direct and control the actions of the employee is vicariously liable for the employee's actions. *See St. Joseph Hosp.*, 94 S.W.3d at 543; *Davis-Lynch, Inc.*, 472 S.W.3d at 70; *Heritage Hous. Dev., Inc. v. Carr*, 199 S.W.3d 560, 565 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The borrowing employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment. *Thompson v. Travelers Indem. Co*., 789 S.W.2d 277, 278 (Tex. 1990); *Heritage Hous. Dev., Inc.*, 199 S.W.3d at 565.

We apply a presumption that an employee remains in his general employment as long as the employee is performing the work entrusted to him by the general employer. *Powell v. Knipp*, 479 S.W.3d 394, 401 (Tex. App.—Dallas 2015, pet. denied); *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191, 201 (Tex. App.—Dallas 2003, pet. dism'd); *see* RESTATEMENT (SECOND) OF AGENCY § 227(b) (1958). The court must then determine if there is contrary evidence suggesting the general employer had surrendered control to the special employer. *Producers Chem. Co.*, 366 S.W.2d at 226; *Cantrell v. Markham & Brown Co. & Assocs.*, 452 S.W.2d 940, 948 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). However, we do not infer that the general employer has surrendered control merely because it has permitted a division of control. *Anthony Equip. Corp.*, 115 S.W.3d at 201; *Lara v. Lile*, 828 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1992, writ denied); *see, e.g., Powell v. Knipp*, 479 S.W.3d 394, 401 (Tex. App.—Dallas 2015, pet. denied) (stating that a person may function as the employee of two employers at the same time and as to the same conduct, "if the service to one does not involve an abandonment of the service to the other"). In examining this issue, we must "carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." *Producers Chem. Co.*, 366 S.W.2d at 226 (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221–222 (1909)).

A contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered in determining an employee's status, but it is not controlling or determinative. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992). "Where the right of control prescribed or retained over an employee is a

controverted issue, it is a proper function for the fact-finder to consider what the contract contemplated or whether it was even enforced." *Id.*; *see Humble Oil & Ref. Co. v. Martin*, 222 S.W.2d 995, 997–98 (Tex. 1949); *Powell*, 479 S.W.3d at 401–02. Thus, "a contractual designation of control will not establish borrowed servant status as a matter of law where evidence shows that the parties acted to the contrary." *Coco v. Port of Corpus Christi Auth.*, 132 S.W.3d 689, 692–93 (Tex. App.—Corpus Christi 2004, no pet.). Further, when the right of control is not expressed in a written agreement, the right of control may be inferred from the facts and circumstances of the work. *Producers Chem. Co.*, 366 S.W.2d at 226; *Phillips v. Am. Elastomer Prods., L.L.C.*, 316 S.W.3d 181, 187 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *Marshall v. Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193, 196 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

The factors enumerated in section 227(c) of the Restatement of Agency can be utilized to determine how much control has been surrendered. *Coco*, 132 S.W.3d at 693; *Anthony Equip. Corp.*, 115 S.W.3d at 201; *Aguilar v. Wenglar Constr. Co.*, 871 S.W.2d 829, 831 (Tex. App.—Corpus Christi 1994, no pet.); *Lara*, 828 S.W.2d at 538. Pertinent to this case, section 227(c) provides:

> [A] continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist. A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more

> likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control.

RESTATEMENT (SECOND) OF AGENCY § 227(c); *see Anthony Equip. Corp.*, 115 S.W.3d at 200–01; *see also Coco*, 132 S.W.3d at 693; *Aguilar*, 871 S.W.2d at 831; *Lara*, 828 S.W.2d at 538.[7] Stated otherwise, the right of control may be inferred from such factors as the nature of the general project, the nature of the work to be performed by the machinery and employees furnished, length of the special employment, the type of machinery furnished, acts representing an exercise of actual control, and the right to substitute another employee. *Producers Chem. Co.*, 366 S.W.2d at 226; *Tex. Prop. & Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.*, 208 S.W.3d 523, 543 (Tex. App.—Austin 2006, pet. denied). Examples of the type of control normally exercised by an employer includes determining when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result. *Thompson*, 789 S.W.2d at 279; *Phillips*, 316 S.W.3d at 187. The fact that an employer issued payroll checks and paid workers' compensation to the employee does not necessarily establish that the

[7] The Fifth Circuit employs a similar test to determine borrowed employee status under the Longshore and Harbor Workers' Compensation Act utilizing the following factors: (1) Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation? (2) Whose work was being performed? (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who had the right to discharge the employee? (9) Who had the obligation to pay the employee? *See Billizon v. Conoco, Inc.*, 993 F.2d 104, 105 (5th Cir.1993); *Brown v. Union Oil Co. of Cal.*, 984 F.2d 674, 676 (5th Cir. 1993) (citing *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969)); *Lomeli v. Sw. Shipyard, L.P.*, 363 S.W.3d 681, 686 (Tex. App.—Houston [1st Dist.] 2011, no pet.) Although the Fifth Circuit has repeatedly stated that "[n]o single factor, or combination of them, is determinative," the court has also repeatedly considered the first factor—control over the employee's work—to be the "central factor" in determining borrowed employee status. *Brown*, 984 F.2d at 676; *see Lomeli*, 363 S.W.3d at 686.

employer had the right of control over the employee's work. *Phillips*, 316 S.W.3d at 187; *Employers Cas. Co. v. Am. Employers Ins. Co.*, 397 S.W.2d 292, 296 (Tex. App.—Amarillo 1965, writ ref'd n.r.e.). Likewise, the ability to hire and fire is not dispositive of the right of control over the employee's work. *Phillips*, 316 S.W.3d at 188.

B. Sufficiency of the Evidence

As a preliminary matter, we remain mindful that our standard of review for an original proceeding regarding a new trial order is abuse of discretion. *See In re Bent*, 2016 WL 1267580, at *5. We examine whether the trial court reached a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly failed to analyze the law correctly or apply the law correctly to the facts. *See In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d at 382; *Walker*, 827 S.W.2d at 839–40.

In this case, the trial court determined that the jury's verdict was not supported by factually sufficient evidence. Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002*); Pool*, 715 S.W.2d at 635; *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761–62 (Tex. 2003). In a factual-sufficiency review, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). Neither the trial court nor this court may substitute its own judgment for that of the jury, even if the court would reach a different answer on the evidence. *Maritime Overseas Corp.*, 971 S.W.2d at 407. The jury is the sole judge of the credibility of witnesses and the weight to be given to their

testimony, and an appellate court must not merely substitute its own judgment for that of the jury. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

Factual insufficiency issues are designated as "insufficient evidence" or "great weight and preponderance" depending on which party had the burden of proof. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). To prevail on a challenge that the evidence is factually insufficient to support an adverse finding on an issue on which the complaining party has the burden of proof, that party must show that the adverse finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam); *Pool*, 715 S.W.2d at 635; *Cain*, 709 S.W.2d at 176. If a party is challenging a jury finding regarding an issue upon which the other party had the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding. *Croucher*, 660 S.W.2d at 58. In this case, the borrowed servant doctrine is an affirmative defense. *Exxon Corp.*, 842 S.W.2d at 630; *Coco*, 132 S.W.3d at 691.

If a court of appeals affirms a challenged jury verdict as being supported by factually sufficient evidence, the court need not detail all the evidence in support of the verdict. *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d at 211; *Gonzalez v. McAllen Med. Ctr., Inc*., 195 S.W.3d 680, 681 (Tex. 2006) (per curiam); *Ellis Cnty. State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994). However, if the court determines the evidence is factually insufficient to support the jury's verdict, we must detail all of the evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d at 211; *Gonzalez*, 195 S.W.3d at 681;

Pool, 715 S.W.2d at 635; *see also Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006). Here, we are reviewing the trial court's new trial order by mandamus under an abuse of discretion standard. We are not performing a standard factual sufficiency review of a jury's verdict on appeal. Under Texas Rule of Appellate Procedure 52.8(d), we are not required to write an opinion when we deny mandamus relief. *See* TEX. R. APP. P. 52.8(d). The jurisprudence of our state is as yet unclear as to our obligations regarding the issuance of an opinion when we review a new trial order reversing a jury verdict on the factual sufficiency of the evidence in an original proceeding, but we conclude that the trial court did not err. In this case, we will explain our rationale for denying relief by detailing the evidence under consideration.

We turn to the facts and circumstances as presented at trial. We focus our attention on evidence pertaining to the borrowed servant issue and do not address liability or damage testimony. We begin with a presumption that Perales remained in his general employment with Peterson. *See Powell*, 479 S.W.3d at 401; *Anthony Equip. Corp.*, 115 S.W.3d at 201. Thomas Peterson, the owner and president of Peterson Construction, testified repeatedly that Perales was an employee of Peterson. Mr. Peterson testified that he hired Perales and he had the ability to fire him. Mr. Peterson specifically testified that he had the ability to terminate Perales's employment on the PSJA project. Mr. Peterson testified that he paid Perales for his work on the PSJA project. Perales testified that he was an employee of Peterson and that Peterson told him to go work on the punch list for Meridian. David Kent Isbell, a registered professional engineer, testified on behalf of Perez that Perales "was employed by Mr. Peterson of Peterson Construction." At trial,

Perales acknowledged that he had previously testified by deposition as a corporate representative for Peterson in this same case.

The parties did not have an executed contract that defined their roles and obligations. *See Exxon Corp.*, 842 S.W.2d at 630. At the inception of the project, Doug Fritz, vice-president of Meridian, sent Peterson an engagement letter stating, in relevant part, the following:

> It was my pleasure to have the opportunity to visit with you during our recent telephone conversation. As I indicated, United Fire and Casualty Company ("United Fire") has retained Meridian Consulting Group to assist the Surety in resolving various issues involving its Principal, AI Cardenas Masonry, Inc. ("AI Cardenas"), including investigating certain matters related to the referenced Project, in which United Fire provided Payment and Performance Bonds for Braselton.
>
> United Fire has requested Meridian to manage the completion of the remaining work related to the referenced project. As we [are] undertaking . . . the completion of the remaining work, we would like to retain the services of your superintendent Mr. Orlando Perales. Enclosed please find two copies of Meridian's Consultant Agreement. We request that you execute the two copies and return them to our San Antonio office. We will execute the same and return one copy to you for your files.
>
> We have also included a copy [of] Meridian's weekly time sheet for your use. Please enter the time and brief description [of the] work performed each day. Fax the time sheet to our San Antonio office . . . each Monday morning. Include a copy of each time sheet with your invoice, which should be mailed to our San Antonio office.

The Consultant Agreement provided, in part:

> The relationship of Consultant to Meridian and the Client in all respects under this agreement is that of an independent contractor. Neither Meridian nor the Client shall be liable for the acts or omissions of Consultant or his agents in performing its work. Consultant agrees to indemnify and hold harmless Meridian and the Client from any loss, costs, damages, and or legal action brought by Consultant and its employees due to physical or emotional injury, property damage, Workmen Compensation claims, unemployment benefits or any other reason whatsoever in respect to the performance of Consultant under this agreement.

Neither Fritz nor Peterson executed the Consultant Agreement.

Peterson contends that Fritz's engagement letter was more indicative of the "true understanding" between the parties than the "boilerplate consultant agreement" attached to the letter but never signed by either party. Peterson contends that Meridian was managing the project, that it was borrowing the services of a single servant, Perales, and that Peterson was not intended to be involved in the project in any other manner. Meridian argues that the correspondence shows that Peterson was intended to serve the role "only of a company lending temporary labor." According to William Marshall Wurzbach Jr., the president and owner of CFC Engineering, a professional engineer who provided expert testimony for Peterson, such a relationship is common in the construction industry. However, the draft agreement between Meridian and Peterson Construction strongly suggests that the parties intended that Perales remain an employee of Peterson.

We consider the nature of the general project and the relationship between the parties. *See Producers Chem. Co.*, 366 S.W.2d at 226; *Tex. Prop. & Cas. Guar. Ass'n*, 208 S.W.3d at 543. Otis "Jack" Lenhart, a senior consultant with Meridian, testified that Meridian is a consulting firm which was retained by the surety, United Fire, to survey the project and develop a cost-to-complete budget and a suggested timeframe for completion. Lenhart testified that, "[b]ased on a recommendation by Meridian, the surety entered into an arrangement with Peterson Construction to oversee and coordinate the completion of the defined scope of work, that work that was defined on the punch lists." Subsequently, Meridian was "assigned the task of preparing and recommending to the surety certain subcontractors who had previously been contracted to Al Cardenas, the principal, for ratification for the purpose of completing their scopes of work." Lenhart

testified that Meridian was essentially a "go-between" for the subcontractor and United Fire. Lenhart testified that "we were charged with overseeing the completion of the punch lists, yet recognizing and recommending to the surety that there was a need for daily on-site detailed level coordination," and that "with Peterson filling that role," Meridian was to "visit with them frequently and by way of receiving status reports, telephone conversations, memos, etcetera, stay abreast of the status and the completion of the punch lists."

In terms of the relationship between Peterson and Meridian, Lenhart testified that he "would actually place Peterson on the same plane with Meridian." According to Lenhart, the companies would be connected horizontally on the same plane on an organizational chart because both were similarly introduced to the project based on informal agreements with United and both were paid by United. Lenhart testified that this was the case even though Peterson was not reporting directly to the surety and was instead reporting directly to Meridian. Lenhart testified that Peterson was "probably" not aware that it was on the same project level as Meridian.

When asked if it was his responsibility to make sure that the punch list items were completed by the subcontractors, Mr. Peterson responded that it was Perales's responsibility, and stated that Perales "was an employee of Peterson Construction." Perales testified that if there was a dangerous condition on site, Peterson had not only the right but the obligation to remedy that. Rogelio Guzman, the risk manager for the district, testified that the district relied on Peterson to manage and superintend this project. Ricardo Flores, the project manager on the PSJA project for San-Co Steel, Ltd. d/b/a Southern Steel Fabricators Ltd., testified that the project supervisor was Perales,

the "superintendent for Peterson," and that "Peterson was hired to oversee that everything was finished out according to the documents." However, in correspondence sent by Lenhart to others involved in the PSJA project, Lenhart identified Perales as Meridian's "onsite representative," or the "Meridian Punch List Coordinator," or the "onsite coordinator."

Mr. Peterson testified that a superintendent such as Perales "generally performs coordination work between [the] subcontractor[s] and also communicates with people in our office, as well as with the architect, and possibly other consultants of the owner, as well as at times the owner." He explained that a superintendent is "usually on the work site on a daily basis and is "involved" in the "process" of ensuring the safe and efficient completion of the construction. Perales similarly testified that the superintendent coordinates and controls the job site and has control over the construction contractors at the site. Isbell concurred that Perales had control over the construction at the PSJA project.

In terms of the specific job, Perales testified that the PSJA project was different from the jobs that he typically handled because he usually works on a project from the beginning to the end, and on the PSJA project, he solely worked on the completion of the project—the closing punch list for the project. Perales also testified that he was usually the "supreme authority" on a project working as a superintendent for Peterson, but on the PSJA project, he thought that Lenhart, acting for Meridian, occupied that position.

Perales testified that during his work on the PSJA project, he reported to the surety, United Fire, but he also testified that he reported to Lenhart regarding his "daily duties" three or four times each week, and Lenhart gave him suggestions on how to handle

specific situations that arose. According to Perales, he did not report his activities to Mr. Peterson or other employees at Peterson. However, he gave his daily field or progress reports on the PSJA project to Peterson, and Peterson then forwarded those reports on the PSJA project to Lenhart. Lenhart did not usually work on-site at the PSJA project, but visited the site at least monthly. Perales acknowledged that Peterson employees asked "how I was doing out there."

Mr. Peterson's testimony at trial was equivocal regarding his review of Perales's daily reports on the PSJA project, although the reports were sent to him daily by his office manager. Mr. Peterson testified that he tried to monitor the PSJA project "a little bit, but only a phone call here or there. Something like that." According to Mr. Peterson, he did not have enough information on the PSJA project to be able to give Perales instructions on the project. Mr. Peterson testified that he could not have supervised Perales on the PSJA site "[w]ith the arrangement we had" with Meridian since it was "an hourly work situation with no contract to finish the project like we might have done with — with other bonding companies." Wurzbach testified that based on his review of the record, he did not see any evidence that anyone other than Lenhart supervised Perales.

Mr. Peterson testified that Perales was qualified to be a superintendent and had been working as a superintendent for Peterson for a lengthy period of time. Perales testified that he had worked for Peterson for ten years and had previous experience at other construction companies working as a superintendent. He had control over the construction contractors at the site and, on a daily basis, worked there without supervision. He was designated by Peterson as the corporate representative who had the most knowledge of the incident in question. *See Anthony Equip. Corp.*, 115 S.W.3d

at 200–01; *Coco*, 132 S.W.3d at 693; *Aguilar*, 871 S.W.2d at 831; *Lara*, 828 S.W.2d at 538. Based on the foregoing, Perales was a construction superintendent who had extensive experience in this occupation and thus had the skill of a specialist. *See, e.g.,* RESTATEMENT (SECOND) OF AGENCY § 227(c); *see Anthony Equip. Corp.*, 115 S.W.3d at 200–01; *see also Coco*, 132 S.W.3d at 693. Further, in terms of the duration of the job, Perales was assigned to serve as the superintendent of construction at the PSJA project until the work was completed. The short length of the special employment is a factor suggesting that Perales remained in his general employment. *See Producers Chem. Co.*, 366 S.W.2d at 226; *Tex. Prop. & Cas. Guar. Ass'n*, 208 S.W.3d at 543.

We have carefully reviewed the record to ensure that the trial court did not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury. Based on our review of the evidence and the applicable legal standards, we conclude that the trial court acted within its discretion in granting Perez's motion for new trial. Based on the evidence at trial, the trial court may have concluded that there was no definitive shift in the right to control Perales's work from Peterson to Meridian. Rather, the evidence shows that Perales did not abandon his service to Peterson, and that Peterson permitted a division of control over Perales with Meridian. *See, e.g., Powell*, 479 S.W.3d at 401; *Anthony Equip. Corp.*, 115 S.W.3d at 201; *Lara*, 828 S.W.2d at 538.

Further examining the verdict with regard to the factors that militate against granting new trials on factual sufficiency grounds, *see Conway*, 610 F.2d at 362–63, we note that the jury in this case was not asked to apply a simple and straight-forward negligence standard, but was instead asked to apply a complicated legal standard, the borrowed servant doctrine, in an affirmative defense application. *See Scott*, 868 F.2d at

789–90. Moreover, the evidence regarding the borrowed servant doctrine was directly and hotly contested between Peterson and Meridian. *See id.* Further, the trial court clearly considered that several aspects of the trial proceedings were irregular or undesirable. *See id.* After one witness openly contradicted her own testimony, the trial court stated that the "indication was she was being harassed by somebody and I don't think it was by — by the Plaintiffs' side." Further, given that Perales had previously testified by deposition as the corporate representative for Peterson, yet Peterson was defending the case at trial on the basis that Perales was the borrowed servant of Meridian, the trial court expressed concerns on the record that Perales was changing his sworn testimony. The trial court thus had a representative from the district attorney's office provide *Miranda* warnings, outside the presence of the jury, to both Perales and the witness who had changed her testimony. *See Miranda v. Arizona*, 384 U.S. 436, 474 (1966). In this regard, we are mindful of the tenets expressed in Justice Lehrmann's concurring opinion regarding merits-based review of new trial orders:

> It is essential to remember in conducting this review, however, that the trial court's authority to grant a new trial "'is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)). I thus concur in the Court's opinion, but write separately to emphasize the significant discretion trial courts are, and must continue to be, afforded in determining whether good cause exists to grant a new trial following a jury verdict.
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> . . . .
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> As we recognized in *Columbia*, "there are differences between the review that can be accomplished by appellate judges who have only the record to consider and trial judges who have seen the parties and witnesses and sensed the [e]ffect of certain evidence or occurrences on the trial." 290 S.W.3d at 211; *see also United Scaffolding*, 377 S.W.3d at 688 (noting that "the trial judge may have observed irregularities not wholly apparent in a

> cold record"); *Jennings v. J*ones, 587 F.3d 430, 437 (1st Cir. 2009) ("[Appellate courts], reading the dry pages of the record, do not experience the tenor of the testimony at trial. The balance of proof is often close and may hinge on personal evaluations of witness demeanor.'" (quoting *United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir.1992))). The trial court, for example, may conclude, based on observations of the jurors' reactions, that they were particularly influenced by improperly admitted evidence or by attorney misconduct and that such error unfairly affected the verdict. Or the trial court may observe jurors being significantly distracted during the presentation of crucial evidence in the case and discern a prejudicial effect on the verdict.
>
> These examples illustrate that determining whether a trial court abused its discretion in granting a motion for new trial after a jury verdict will rarely be as cut-and-dry as confirming that evidence or testimony referenced during a closing argument is or is not in the record. Often, the trial court's presence and observations throughout the trial will be indispensable in evaluating whether the requisite good cause exists to justify setting aside a jury verdict and granting a new trial. *See Columbia*, 290 S.W.3d at 212 ("We do not retreat from the position that trial courts have significant discretion in granting new trials."). Recognizing the need to defer to trial courts with respect to such determinations is crucial to ensuring that parties receive a fair trial.

In re Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d at 763–64 (Lehrmann, J., concurring); *see also Bell v. Campbell*, 328 S.W.3d 618, 620 (Tex. App.—El Paso 2010, no pet.) ("We recognize that the trial court is best situated to observe the demeanor and personalities of the witnesses and can 'feel' the forces, powers, and influences that cannot be discerned by merely reading the record.").

After careful scrutiny of the new trial order and the record, we conclude that the trial court did not clearly abuse its discretion because its articulated reasons for granting a new trial are supported by the law and the record. We overrule Peterson's first issue urging the contrary view.

VI. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus,

the response, and the reply, is of the opinion that Peterson has not met its burden to obtain mandamus relief. Accordingly, we deny the petition for writ of mandamus.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
17th day of June, 2016.