Granted

No. 99-161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

CHAD WEISGRAM, ET AL.

Petitioners,

v.

MARLEY COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

of the fire without any effort to determine whether they met the level of intellectual rigor required in the field of fire investigation. Without such an objective standard, the court's reliability determination amounts to little more than an evaluation of weight and credibility. The Seventh Amendment commands that an adverse ruling by the appellate court on that basis must afford the party the option of a new trial.

ARGUMENT

Respondents repeatedly sound their theme in this case: "The case should not have gone to the jury, but did." Brief in Opp. at 5 & 12. But the case did go to the jury, and that makes a great deal of difference. The rules of civil procedure and "the influence -- if not the command -- of the Seventh Amendment, *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958), protect the verdict winner from reexamination of the jury findings and trial by appellate court.

I. THE COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE DISTRICT COURT FOR ENTRY OF JUDGMENT AS A MATTER OF LAW, RATHER THAN FOR A NEW TRIAL

A. The District Court Correctly Denied Judgment As a Matter of Law Regardless of the Inadmissibility of Some Expert Testimony

The majority of the Eighth Circuit Court of Appeals determined that "portions of the testimony from three of plaintiffs' witnesses were unreliable," citing this Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and that the District Court "abused its admittedly broad discretion in allowing the suspect testimony." *Weisgram v. Marley Co.*, 169 F.3d 514, 517-18 (8th Cir. 1999). Determining further that without the inadmissible testimony plaintiff's case was insufficient to go to the jury,

the court ruled that the trial judge erred in denying Marley's motion for judgment as a matter of law. *Id.* at 522. The court directed the District Court to enter judgment as a matter of law for Marley, pointedly rejecting any suggestion that it remand the case for a new trial. *Id.* at 522& 517 n.2.

Following a jury verdict, Fed. R. Civ. Pro. 50(c) affords the trial judge the options of allowing the judgment to stand, entering judgment for the verdict loser, or ordering a new trial. The rule does not expressly address the problem that after trial, and certainly on appeal, it is too late to fix errors that could have been cured during trial but for the trial court's ruling. By choosing the option of ordering a new trial, the district court or court of appeals can assure that the rule is applied in accordance with substantial justice.

The potential for unfairness in the entry of JAML rather than a new trial is readily apparent in this case. Plaintiffs presented three experts whose testimony gave a fairly complete picture for the jury of how the Weisgram fire started. Fire captain Dan Freeman, who had helped put out the blaze and who was also a certified and experienced fire investigator, described the physical evidence at the scene which, he stated, pointed to the baseboard heater as the source of the fire. He also explained that the physical evidence was not consistent with the theory that a cigarette had been dropped into the couch. He testified he did not know why the heater malfunctioned. "That's why I sent it to Mr. Dolence." Trial Tr. of May 20, 1997 (testimony of Dan E. Freeman) at 64.

Ralph Dolence, a fire investigator and master electrician with experience investigating fires in household appliances, stated, based on examination of the heater and consultation with Freeman, that the thermostat had malfunctioned and the high limit switch did not shut off the heater as intended. However, he stated, he did not know why the thermostat and switch malfunctioned. Trial Tr. of May 21, 1997 (testimony of Ralph Dolence), at 126-28.

For this reason, the heater was examined by a metallurgist, Sandy Lazarowicz. He testified that serrations on the thermostat contacts caused arcing that eventually caused them to weld together allowing the heater to reach a temperature sufficient to ignite nearby combustibles. 169 F.3d at 521.

The district court overruled Morely's objections to the experts' testimony at trial and denied its post-verdict motions. The judge specifically found the proffered testimony reliable as well as relevant as required under *Daubert. Weisgram v. Marley Co.*, No. A3-95-103 (D.N.D., Sept. 4, 1997) at 5-8.

The court of appeals, however, applied a far more restrictive standard of reliability than the trial judge, characterizing portions of the experts' opinions as inadmissible "speculation." The court concluded that, under North Dakota law of strict liability, without the expert opinions it found inadmissible, "the heater cannot be proven to have been defective when Marley sold it [so] there was not sufficient evidence for the jury to find for plaintiff." 169 F.3d at 522. The court ruled that "Marley is entitled to judgment as a matter of law on plaintiffs' claims." *Id.* at 517.

Entry of judgment as a matter of law after the jury's verdict prejudices Weisgram in manner described earlier: It is too late to cure the error. Prior to submission of the case to the jury, plaintiffs could have attempted to obtain additional or differently qualified experts. They may have relied on a different manner of proving liability.

Nearly every U.S. court of appeals that has looked at the unfairness of this result has adopted a fairly straightforward means of assuring substantial justice: In ruling on a post-verdict motion for judgment as a matter of law, the court must consider all the evidence before the jury, including evidence later found to be inadmissible. The Eighth Circuit itself has adopted this position and explained its

rationale:

> The subsequent ruling [to exclude admitted evidence], after the verdict, . . . placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such [evidence] was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Midcontinent Broadcasting Co. v. North Central Airlines, 471 F.2d 357, 359 (8th Cir. 1973). The Eighth Circuit made clear that entering judgment on the basis of a record "altered" by the excision of inadmissible evidence was error.

> Although the trial court found insufficient evidence to sustain the verdict, it did so only after excluding plaintiff's expert testimony which had been presented to the jury. This was error. In ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence.

Id. at 358.

The Ninth Circuit has adopted the same position, supported by the same persuasive considerations of fairness to the verdict winner:

> [W]when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing.

Schudel v. General Electric Co., 120 F.3d 991, 995 (9th Cir. 1997), cert. denied, 118 S.Ct. 1560 (1998).

In fact, nearly every other U.S. court of appeals that has considered this issue has arrived at a similar position. See, e.g., *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990)(plaintiff had relied upon expert testimony that the trial judge had ruled admissible and was "clearly prejudiced" by entry of jnov because "fairness requires that Persinger have an opportunity to supply additional evidence of negligence."); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343- 44 (6th Cir. 1992); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *see also* 21 Charles A. Wright and Kenneth A. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 5041, at 228-29 (1977) ("The judge cannot grant a directed verdict or judgment notwithstanding the verdict by ignoring evidence he has admitted on the ground that the admission was error.")

The sole contrary decision, *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) relies on "the homespun axioms that a litigant is entitled to only one bite of the apple or to only three strikes at bat." *Id.* at 1199. ATLA suggests that plaintiffs here do not seek extra strikes; they hit their home run with the jury, but it has been called back. It is Marley that obtained a second bite at the apple in the form of reexamination by the court of appeals of the jury's factual findings in violation of the Seventh Amendment.

It is true that the rules should minimize the unnecessary new trials. The approach espoused by the lower court in this case, however, would result in far greater waste. It requires that litigants prepare and proffer an overabundance of expert opinion and other evidence on factual issues so as not to lose the verdict -- not to an unconvinced jury, but to a disbelieving appellate court. Even that profligate strategy would likely fail in the face of a ruling by the trial judge that

the party's additional evidence was excludable as cumulative under Fed. R. Evid. 403.

The trial judge did not err in denying Marley's motion for judgment. Even if the expert testimony relating to the defect in the heater was admitted in error, the remedy following the jury's verdict was, at best, a new trial. The appellate court's order to enter judgment for Marley should therefore be reversed.

B. The Lower Court's Failure to Remand for New Trial Constituted Abuse of Discretion

The court of appeals, stated that, although Rule 50(d) permits the court to remand for a new trial, "we can discern no reason to give the plaintiffs a second chance to make out a case of strict liability." [517 n.2] With due respect, ATLA suggests that reasons for such a remand were readily apparent and that the court's refusal to do so amounted to an abuse of discretion.

1. Appellate courts, like trial courts, should consider all the evidence, including inadmissible evidence, in considering a motion for judgment as a matter of law.

As noted earlier, the prevailing rule among the federal circuits requires that district courts passing on motions for JAML consider all the evidence in the case in the light most favorable to the verdict winner, including evidence the court has ruled inadmissible. The rationale for the rule -- fairness to the party who has relied upon the court's evidentiary rulings -- is equally compelling when appellate courts consider motions for JAML.

The Tenth Circuit held precisely that in *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), a product liability action. The manufacturer argued to the appellate court that it was entitled to JAML because the testimony of plaintiffs' experts was inadmissible under *Daubert*. The court disagreed, stating that, even if the experts should not have been permitted to testify, appellant's remedy "is, at best, a

new trial." The court explained that "[l]ike the district court, we must evaluate the Rule 50(b) motion by looking at all evidence admitted at trial, even that which was admitted in error." On appeal, as in the district court, the rule promotes certainty and fairness. *Id.* At 1269.

The Eighth Circuit's decision to take away the verdict rendered by the jury in plaintiff's favor is plainly inconsistent with substantial justice. The majority opinion disparagingly suggests that new trial would "give the plaintiffs a second chance" after they "had a fair opportunity to prove their claim and they failed to do so." 169 F.3d 517 n.2. On the contrary, that option would preserve plaintiff's right to a jury trial after having successfully proved their claim to a jury in reliance on the trial judge's evidentiary rulings.

2. Appellate courts should remand for a new trial determination where reversal is based on matters entrusted to the discretion of the trial judge.

This Court has held that, although Fed. R. Civ. Pro. 50(d) does not explicitly so provide, "there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Neely v. Martin K. Eby Const. Co.,* 386 U.S 317, 324 (1967).[2]

However, the Court cautioned, "where the court of appeals sets aside the jury's verdict because the evidence was

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2 **Denial of Motion for Judgment as a Matter of Law.**

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Fed. R. Civ. Pro. 50(d).

insufficient to send the case to the jury, it is not so clear that the litigation should be terminated." 386 U.S. at 327.

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues -- because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id at 325.

Hence, the Court concluded, "the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329. Significantly, the Advisory Committee's Note to Rule 50(d) suggests that "remanding the case for a determination by the trial court as to whether a new trial should be granted. . . . is advisable where the grounds urged are suitable for the exercise of trial court discretion."

In this case, the court's decision to reverse was based entirely on the determination of whether testimony by plaintiffs' experts was reliable as well as relevant under this Court's decision in *Daubert*. That determination, this Court has repeatedly emphasized is entrusted to the broad discretion of the trial judge. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1176 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). In these circumstances, the argument in favor of remanding for a new trial, rather than entry of judgment, was especially strong. The court's failure to do so amounted to an abuse of its own discretion.

II. THE COURT'S ORDER OF JUDGMENT AS A MATTER OF LAW VIOLATED THE SEVENTH AMENDMENT PROHIBITION AGAINST REEXAMINATION OF JURY FINDINGS

The Seventh Amendment commands that in suits at common law, the right of trial by jury shall be preserved.[3] Its purpose is preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935).

Justice Black, shortly after the Rules of Civil Procedure became effective, perceived that vigilant review of judicial decisions that evidence is insufficient as a matter of law would be critical to protecting the jury right:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issued in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

Galloway v. United States, 319 U.S. 372, 407 (1943)(Black, J., dissenting). The price of the lack of vigilance may well be "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore,*

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[3] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST., amend VII.

439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway,* 319 U.S. at 397.

For these reasons, this Court has been highly protective of the jury's role:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). *See also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1196, 1200 (8th Cir. 1994) (on motion under Rule 50 for judgment as a matter of law, courts "must not engage in a weighing or evaluation of the evidence or consider questions of credibility" in determining that no reasonable inference can sustain the verdict).

In this case, the majority of the court of appeals clearly based its decision on an assessment of the weight and credibility of the opinions of plaintiffs' experts. The court's opinion is replete with disparagements of the fire investigators' methods and conclusions. The court suggests Captain Freeman did not gather a sufficient number of physical samples and photographs from the scene. at 169 F.3d at 519. The court also finds reason for skepticism in the fact that Dolence did not visit the Weisgram house, that he consulted with Freeman, the fire investigator on the scene, and did not test his theory on the burned heater. *Id.* at 519-20.

The court, however, made no inquiry into whether the investigators' methods were of the type "generally accepted in the relevant [fire investigating] community." *Kumho Tire,* 119 S. Ct. at 1176. The objective of the *Daubert* standard

> is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of

> intellectual rigor that characterizes the practice of an expert in the relevant field.

Id. Without that objective basis for comparison, the court's conclusion that the investigators' testimony was speculative or unreliable amounted to little more than the court's own lay opinion of the witnesses' credibility. Merely to recite this Court's conclusion in another case that there "is simply too great an analytical gap between the data and the opinion proffered." 169 F.3d at 521, quoting *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), cannot substitute for at least some inquiry into whether the level of inference the experts employed to bridge that gap was acceptable within the field of their own expertise.

The jury was surely entitled to credit the testimony of the Freeman, who arrived to put out the fire and began his investigation literally while the trail was literally still warm and who was not compensated by plaintiffs for his testimony. The jury was equally entitled to discredit the opinion of Morely's paid experts, whose "discarded cigarette" theory was inconsistent with the physical evidence in the case. Those credibility determinations were properly for the jury.

Court's reexamination of the jury's verdict on appeal constituted, at best, a review of the weight of the evidence. Plaintiffs essentially occupied the same position as petitioner in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210 (1998), whose jury award of damages was determined by the court of appeals to be not supported by the evidence. This Court unanimously held that the appellate court's entry of judgment for a lower amount without affording her the option of a new trial, violated the Seventh Amendment. ATLA suggests that the Seventh Amendment commands no less in this case.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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