No. 99-161

IN THE SUPREME COURT OF THE UNITED STATES

CHAD WEISGRAM, *et al.*,
Petitioners,

v.

MARLEY COMPANY, *et al.*,
Respondents,

BRIEF OF RESPONDENTS

Filed December 10, 1999

QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals is authorized to order judgment as a matter of law for the defendant after determining there was no legally sufficient evidentiary basis for the jury's verdict.

INTERESTED PARTIES

The Respondent is correctly denominated as: The Marley Company, a Delaware corporation, and its division, Marley Electric Heating Company, and United Dominion Industries, Inc., a Delaware corporation.

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Summary of Facts and Procedural History

The facts of the fire and its aftermath are correctly stated in the court of appeal's opinion in *Weisgram v. Marley Co.*, 169 F.3d 514, 516 (8th Cir. 1999), and Marley will not repeat all of them here.[1] When firefighters entered Weisgram's home on the morning of December 30, 1993, they found a small fire burning in the entryway near the front door of the lower level of the home and Bonnie Weisgram's body lying in an upstairs bathroom. The rest of the house was filled with smoke and heat, but was not damaged by fire, with the exception of a large couch in the upstairs living room, which was mostly destroyed by fire. *Freeman*, 16-17, 27, 117, 177-78. A later autopsy revealed that Weisgram died of carbon-monoxide poisoning several hours before the fire in the entryway started and that she was intoxicated at the time of her death. *R. II*, 25, 32, 39, 41-43. Her blood also tested positive for a toxic amount of antidepressants.

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[1] Marley acknowledges that this Court's order granting certiorari is limited to the sole question of the propriety of JMAL under the circumstances of this case. The question originally presented for certiorari by the petitioners *assumed* the correctness of the court of appeal's decision to exclude the testimony of plaintiffs' experts. *Question 2, Pet. for Cert.* Petitioner has nevertheless included an extensive discussion of the expert evidence in his opening brief in this Court, and he has now asserted, for the first time in this Court, that he established, *even without the excluded expert testimony*, that the heater was defective in design and manufacture "because it did not shut off at 190° Fahrenheit." Given the posture of this case as set forth in the petitioner's brief, Marley believes a brief summary of the facts and procedural history is therefore warranted. For a more complete statement of the facts and analysis of the evidence at trial, Marley respectfully refers the Court to appellants' opening brief in the court of appeals at pages 1-24.

The investigating fireman, Freeman, focused his investigation on an electric heater manufactured by Marley that was mounted on a wall near the floor in the entryway. He did not seriously investigate the possibility of a cigarette ignition of the couch because he had mistakenly been told that Bonnie Weisgram was not a smoker and he did not see any "smoking material" in the home. *Freeman,* 31; *Dolence*, 59-60. Weisgram was last seen alive by her fiancé at 11:00 p.m. on the evening of December 29, 1993. He observed her drink an alcoholic beverage and smoke a cigarette before he left. *R. III,* 31 (*Higgs dep.*, 47-49)

Weisgram's adult son, Chad, petitioner, sued The Marley Company (Marley), respondent, in federal court for wrongful death, claiming that the baseboard heater was defective and caused the fire. State Farm, insurer of the Weisgram home, sued to recoup the amount it had paid in insurance benefits.[2]

The Heater

The Marley heater was installed in the entryway of the Weisgram home in 1979. It is a 500-watt convection-type heater; it draws cool air through the bottom vent around the heating element and circulates warm air from the top vent. *Phy,* 20-28, 105-6. The heater was equipped with two temperature-regulating devices: the thermostat control and the high-limit control. *Id.*, 36-41. The thermostat served as the primary mechanism for controlling the temperature of the heater, and it was designed to open the circuit and shut off the heater upon sensing warm air. *Id.*, 36-39. The high-limit switch was a safety feature specifically designed for the purpose of preventing overheating of the heating element during abnormal conditions such as blockage. *Id.*, 41. In addition, the heating element itself is designed so that it cannot overheat. *Id.*, 22-23; *Miner,* 17-18.

[2] After certiorari was granted, State Farm was dismissed from the appeal and it is no longer a party.

Plaintiffs' Experts

Freeman sent the Marley heater to Ralph Dolence,[3] a retired fireman, a few days after the fire. Dolence examined the remains of the heater and found no evidence of defect or malfunction. He nevertheless reported to Freeman that both the thermostat control and the high-limit safety device "failed or malfunctioned" and that the heater had "run away." At trial, Dolence admitted that when he reported to Freeman the heater was the cause of the fire, he did not even have a "theoretical explanation of the cause." *Dolence,* 115-16, 128. Undeterred, Dolence constructed an elaborate theory that called for two simultaneous and unrelated failures (of the thermostat and the high-limit switch) in the heater, blockage of the heater by a rug, and ignition of vapors under the floor. *Weisgram,* 169 F.3d at 519-20 (8th Cir. 1999). Dolence had no evidence that these things occurred, so he simply said that they did. *Id.*

State Farm named another expert, Sandy Lazarowicz, a metallurgist. After initially examining the subject heater, Lazarowicz submitted a report concluding that the thermostat contacts had remained in the closed (energized) position at the time of the fire. In his report, the only evidence he cited in support of that conclusion was a serrated pattern on the fixed side of the contact. *Report, 8th Cir. App.,* 000192. When shown the same serrated pattern on another contact that had not been in a fire, Lazarowicz admitted he had been wrong when he said the serrated pattern on the fixed contact proved

[3] Dolence, a retired fireman with a high-school education, works as a consultant for plaintiffs' attorneys, testifying that various products cause fires. *Dolence,* 121; *Dolence dep.*, 21, 31-34; *8th Cir. App.*, 000160-61.

the contacts had been closed in the fire. *Id.*, 000209. In his first deposition, Lazarowicz refused to say whether he saw evidence of welding in either the thermostat or high-limit contacts (*Id.*), but in a second deposition, Lazarowicz opined that the thermostat contacts were "welded shut" during the fire, then came "unwelded" and opened up after the fire. (There is no dispute that when Dolence first examined the heater after the fire, the thermostat contacts were open, *not* welded shut.) In his second deposition, Lazarowicz said, for the first time, that the serrations and rounded shape of the movable contacts in the thermostat were design defects. *Laz.*, 85-86. At no time did Lazarowicz find any defect in the high-limit switch. *Id.*, 84-86.

In an extensive pre-trial motion, Marley asked the district court to strike the expert testimony of Dolence, Lazarowicz and a third expert, Gorman, based on Rule 702 and on this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993). *Rule 702 motion, 8th Cir. App.*, 000109-219. In the motion, Marley set forth at length the reasons why the testimony offered by Dolence, Lazarowicz and Gorman did not rest on reliable scientific foundation. Not only did these experts lack the educational background, training, and specialized experience — Dolence on heater design and failure analysis, and Lazarowicz on heater design and evaluation of electrical contacts — but the opinions were themselves completely devoid of any scientific support. *Id.* Dolence admitted he had not personally conducted any testing and that he was unaware of any studies done by others in support of his theory that a 500-watt heater blocked by a rug could cause a fire by igniting unidentified vapors under a 15-year old floor.[4] Similarly,

[4] Dolence had theorized that the heater was blocked by a small floor mat in the entryway and had ignited adhesive vapors under the vinyl floor. He admitted, however, that he had no evidence that a rug actually did block the heater, "no idea" what the adhesive was (or even if it was

Lazarowicz admitted he had conducted no testing himself and proffered no testing by others or any other support for his conclusion that silver contacts had "welded" and then later "unwelded." Lazarowicz admitted he was not an expert in contact theory or design and that had no professional experience in testing them.[5]

During the pre-trial hearing on Marley's *Daubert* motion, the district court acknowledged its duty to act as a gatekeeper, but denied the motion, based on its mistaken impression that *Daubert* only applied to "new science" and on its mistaken belief that "bare assertions *are* the proper subject of expert opinions." *Pret. tel. conf.*, 16-17. Marley advised the district court that the Eighth Circuit's opinions had clearly settled this issue and had applied *Daubert* to exclude expert theories that had not been subjected to testing, peer review, or the other indicia of reliability described in *Daubert*. *Id.*

The Trial

Plaintiffs' Expert Testimony

The district court denied Marley's motion to preclude Lazarowicz and Dolence from testifying. *F. pret. conf.*, 11. The case was tried to the jury on a theory of strict liability. The plaintiffs abandoned their negligence theory before trial.

flammable), and that he had performed no tests to support his theory that adhesive could vaporize and be ignited by a blocked heater. *Marley's 702 Motion, 8th Cir. App.*, 00017-19; *Dolence dep., 8th Cir. App.*, 000159-67.

[5] Marley did not include the fire investigator, Freeman, in its *Daubert* motion because plaintiffs had listed Freeman in the Magistrate's pre-trial order only as a fact witness and not as an expert. Marley did move to preclude a third expert, John Gorman, whom plaintiffs had identified, on the ground that his opinions were based on pure speculation, and not supported by any facts, testing, or scientific principles. *Rule 702 motion, 8th Cir. App.*, 000119-123.

At trial, over Marley's objections, the district court permitted the plaintiffs to present expert testimony from the fire investigator, Dan Freeman, as well as from Dolence and Lazarowicz.[6] Plaintiff voluntarily chose not to call Gorman.[7]

At the close of plaintiffs' evidence, Marley moved for a directed verdict, arguing that, under Rule 50, plaintiffs' experts' evidence on causation was based on "speculation" and was therefore "void." Also, since the experts had not identified a specific defect or mechanism of causation, Marley argued there was no basis upon which a jury could conclude that the Marley heater caused the fire. *R. VI,* 4. The court denied the motion. *Id.,* 5.

Marley's Expert Testimony

Marley's experts described the physical evidence proving that the heater was not defective and had not caused the fire, but had only been damaged by heat from an external fire source. Marley engineer, Mike Phy, explained that the thermostat contacts, the components that open and close the circuit, were not welded or stuck together, as Lazarowicz had opined. *Phy,* 40-41.

Richard Moore, a highly-qualified engineer who had spent his entire professional life designing, studying, and testing contacts, explained that the thermostat contacts in the Marley heater could not possibly have welded in a 2-amp application because the switch was designed and tested for an extended electrical life at 22 amps. *R. VII,* 61-64, 77-78. At an electrical load of only 2 amps, Moore said exemplar

[6] Plaintiffs' experts' theories at trial are set forth in detail in Marley's opening brief in the Eighth Circuit at pages 14-20.

[7] Marley had filed a separate motion to preclude Gorman from testifying based on his failure to comply with Rule 26(a)(2) F.R.Civ.P. *Clerk's Docket No.* 33; *8th Cir. App.,* 00006.

contacts he tested could not be made to weld under any test conditions. *Id.,* 63. Moore explained that, if the contacts had welded, as Lazarowicz had opined, the contact surfaces would have shown the unmistakable characteristics of a ductile fracture, features that are well understood and recognized by competent material scientists. *Id.,* 67-68. The contacts in the Weisgram thermostat, he said, did not show the features of a ductile fracture because they did not and could not weld. *Id.,* 68.[8]

Marley's Rule 50 Motions

At the close of all the evidence, Marley renewed its Rule 50 motion for directed verdict on the ground that plaintiffs had failed to meet their burden of proof of defect or causation. *R. VII,* 160-161. The trial court again denied the motion. The jury returned a verdict for the plaintiffs. *Verdict, J.App.,* 161.

Marley then moved for judgment as a matter of law, or in the alternative, for a new trial, in accordance with Rule 50(b) F.R.Civ.P. In its brief in support of the post-trial motions, Marley set forth at length its arguments in support of judgment as a matter of law. *Post-trial motions, 8th Cir. J.App.,* 000294-331. At no time did Weisgram or State Farm seek a conditional new trial under the provisions of Rule 50(c) F.R.Civ.P. Again, the district court denied the motions and entered judgment for the plaintiffs on the jury verdict. *Order A-28, Pet. for. Cert.*

The Appeals

Marley appealed, claiming that its post-trial motions should have been granted. Marley's briefs in the Eighth

[8] Marley's expert testimony at trial is set forth in greater detail in Marley's opening brief in the Eighth Circuit at pages 20-24.

Circuit again set forth extensive factual and legal reasons why Marley was entitled to judgment as a matter of law under Rule 50. Marley argued that plaintiffs' case was not legally sufficient evidence under Rule 50 because Dolence's entire theory of fire causation was a fabrication and Lazarowicz had never even tried to explain how the thermostat contacts, even if they had "stayed closed" as he had opined, could have caused a fire, given Michael Phy's unrefuted testimony that the Marley heater was designed so that the temperature could not continue to rise, even if the thermostat contacts had failed to open. *Appellants' 8th Cir. O.Br.*, 27-36; *Reply Br.*, 1-21.

In response, Weisgram and State Farm, as appellees, never addressed the possibility that the verdict would be set aside and JMAL would be granted. They never intimated in the court of appeals that they wished to invoke the provisions of Rule 50(d), which expressly reserves to the verdict winner the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside. Instead, they only urged the Eighth Circuit to uphold the jury's verdict.

Stating that it had "very carefully" reviewed the "entire transcript of the trial," the Eighth Circuit held that the evidence at trial was not legally sufficient to prove by a preponderance "that the heater was defective at the time Marley sold it, much less that any purported defect rendered the heater unreasonably dangerous and proximately caused the fire that resulted in the tragic death of Bonnie Weisgram . . . ." *Weisgram*, 169 F.3d at 517. The court concluded that neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and that Lazarowicz's testimony about the defective thermostat contacts and placement of the high-limit control was not sufficiently reliable under Rule 702 to have been admitted into evidence. Finding that these witnesses offered the only evidence of defect and that their testimony had a "substantial influence on the jury's decision," the appellate court held that Marley's post-trial motion for

JMAL should have been granted. *Id.*, 522. The Eighth Circuit vacated the judgment for the plaintiffs and remanded the case to the district court with instructions to grant Marley judgment as a matter of law.

Weisgram and State Farm petitioned for rehearing and rehearing en banc, but they never proffered any grounds for the court of appeals to grant a new trial. Nor did they suggest there were any circumstances that required the appellate court to remand to the district court the issue of the propriety of a new trial. Instead, Weisgram and State Farm simply echoed Judge Bright's dissenting view that a new trial is always required if the district court erred in admitting the testimony of the plaintiffs' experts.

After the petition for rehearing was denied, Weisgram and State Farm sought a writ of certiorari, presenting the question whether the court of appeals could properly grant JMAL to Marley after determining that plaintiffs' experts' testimony should have been excluded at trial. Even in their petition for certiorari, Weisgram and State Farm offered no showing of grounds for a new trial that they contended should have been passed upon by the trial court. Once again they simply argued that this Court should grant certiorari to promote "uniformity of decisions" and to "resolve conflicts between the circuits on this issue." *Pet. for Cert.*, 11.

In his brief on the merits to this Court, petitioner Weisgram has now suggested for the first time that he has a ground for a new trial: he might have called "two other expert witnesses" or laid "additional foundation" for the "erroneous opinions petitioner offered on the experts who were called." *Pet. Br.*, 29-30. Petitioner also suggests in his brief at page 22 that the case should be remanded so that he could be "afforded an opportunity to argue there is substantial evidence remaining which would support a verdict." This Court declined to grant certiorari to review petitioner's question number one regarding the sufficiency of his evidence. Hence,

petitioner's argument that he must be afforded another opportunity to make his case on circumstantial evidence is not properly before this Court.

Disputed Points in Petitioner's Statement of the Case

Marley disputes many of the points in Weisgram's recitation of the evidence regarding the cause of the fire and alleged heater defects. But the admissibility of plaintiffs' experts' theories and opinions is not before this Court, and therefore Marley will not attempt a point-by-point refutation of the inaccurate items. Rather, Marley would refer the Court to its analysis of the record in its opening brief in the Eighth Circuit at pages 1-24.[9]

A few points require mention. At pages 6-7 of the brief, Weisgram reiterates the Dolence/Freeman thesis that a throw rug in the entryway was "pushed up" against the heater, "trapping" its heat and igniting adhesive under the floor. By stating these theories as fact, Weisgram fails to come to grips with the Eighth Circuit's conclusion that these very theories were nothing more than fabrications and "rank speculation." *Weisgram*, 169 F.3d at 520.

At page 10 of the brief, Weisgram recites Lazarowicz's claim that the thermostat contacts were temporarily "welded together" at the time of the fire, despite the fact that they were not welded, but separate, when Dolence first examined the heater after the fire. It is true that Lazarowicz told the jury that the contacts were welded together, even though in his first deposition he had adamantly refused to say whether he could see evidence of welding. *Weisgram*, 169 F.3d at 521. But saying contacts welded does not make it so, and

[9] The accuracy of the statement of facts in Marley's opening brief is not disputed. By failing to take issue with any of it in their own brief, Weisgram and State Farm conceded its accuracy.

Lazarowicz came into the courtroom armed with nothing more than his *ipse dixit*. As the Eighth Circuit pointed out in its opinion at 169 F.3d 520-21, Lazarowicz had no background or experience in electrical contacts and he knew "practically nothing" about how the heater worked.[10] *Id.* Weisgram fails to address the Eighth Circuit's conclusion that Lazarowicz was not competent to testify the contacts had welded where he was unaware of the heater's wattage or the amperage it drew, and where he had performed no tests to determine whether it was even "theoretically possible" for the contacts to weld in this 2-amp application. *Id.*[11]

At page 12 of the brief, Weisgram's reference to the "unusual serrations" on the thermostat contacts as a design defect merits a brief comment. Lazarowicz's sole basis for calling the serrations a defect was that, in the three-to-four dozen contacts he had seen in his lifetime, none had serrations. *Laz.*, 94. Lazarowicz admitted he had never read any literature from any source that suggested the serrated design was a defect (*Id.*, 96), and said he did not need to know the manufacturer's design criteria for the contacts nor the design purpose of the serrations. *Id.*, 107.[12] The sum total of

[10] Lazarowicz's sole basis for claiming the thermostat contacts welded was his comparison of the Weisgram contacts with the exemplar Ferguson contacts. In reality, neither the Weisgram nor the Ferguson contacts showed any evidence of welding. They both showed absolutely normal contact wear, with no sign of welding or sticking. *Phy*, 40-41; *Moore, Acampora, R. VII*, 61-64, 77, 126-28.

[11] Marley introduced uncontroverted scientific testing through exceptionally qualified witnesses that at an electrical load of only 2 amps, exemplar contacts could not be made to weld under any test conditions. *R.VII*, 61-64, 108-11.

[12] In fact, the switch manufacturer, Unimax, and its successor have made about three million switches per year since the 1950's comparable to the one at issue in this case, *all* of them with serrations. The manufacturer added serrations to the contact surface as an enhancement to contact

Lazarowicz's basis for calling the serrations a design defect was his statement that serrations "wouldn't be a plus benefit at this time." *Id.*, 94. The court of appeals was correct in concluding that Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *Weisgram*, 169 F.3d at 521.

Weisgram's claim at page 11 of the brief that the lack of electrical arcing on the high-limit contacts "conclusively established that the control did not activate . . . even when the temperature in and around the heater reached or exceeded 190° Fahrenheit" is a misrepresentation of the record. In fact, the lack of arcing does *not* establish that the high-limit did not open as it was designed to open at 190°, but merely proves that when the high-limit switch opened as it was designed to open, the heater was not carrying current. In other words, the heater was not running. Lazarowicz admitted this basic fact several times during the trial. *Laz.*, 83-84, 113, 115. He conceded he did not know the temperature at which the high-limit opened during the fire. He also admitted that he could have tested the Ferguson exemplar to see if it opened at 190°, as designed, but he did not perform the test. *Id.*, 115.[13]

Weisgram's suggestion on page 13 of the brief that Marley's testing did not "dispel the notion" that the heater was defective is misleading. In fact, Marley's testing program demonstrated that the high-limit switch cycled exactly as it was designed to cycle and that the overall temperatures seen

performance: "it tends to keep the resistance down for running low current." *R. VII*, 112-13.

[13] Dr. Russ Ogle, an independent chemical engineer retained by Marley, did check the function of the Ferguson exemplar high-limit switch in an oven and proved that it cycled normally at the set point of 190° Fahrenheit. Lazarowicz conceded at trial that he had never identified either a design or a manufacturing defect in the high-limit control in the Weisgram heater. *Laz.*, 84-86.

by the heater were far too low to pose a fire hazard.[14] *Ogle*, 79-84. Weisgram failed to answer the Eighth Circuit's observation that it was Dolence's own temperature tests that established there was no defect in the heater's design. *Weisgram*, 169 F.3d at 520. After checking the temperatures in the Ferguson exemplar, Dolence conceded there were no defects in the heater because he tried but could not make the 500-watt heater overheat, even at maximum output. *Id.*

Contrary to plaintiffs' suggestion at page 14 of his brief, Marley's principal defense at trial was that the heater was not defective in any respect and did not cause the fire. In fact, Marley presented uncontroverted scientific evidence at trial through competent expert testimony that: (1) the working components in the heater (the thermostat, high-limit, and heating element) had all functioned normally; (2) the thermostat contacts were not capable of welding together at 2 amps; and (3) this 500-watt heater was not capable of generating enough heat to ignite anything near it in the manner plaintiffs' experts had theorized.

At page 15 of the brief, Weisgram suggests that Ogle's test program proving that the fire patterns in the Weisgram couch were indistinguishable from patterns left by smoldering-cigarette ignition was refuted by eye witnesses at the scene. Since State Farm did not preserve the couch or the fire scene, Ogle's opinions were based on the Fargo Fire Department's and State Farm's photographs of the scene. *Ogle*, 149-151; *Ex.* P-9, P-217; See also, *Weisgram*, 169 F.3d 519, N.5.

[14] Plaintiffs challenged neither Dr. Ogle's qualifications nor the scientific methodology he employed in his testing program.

SUMMARY OF THE ARGUMENT

The court of appeals's decision to grant Marley judgment as a matter of law should be affirmed. The only question before this Court is whether the Eighth Circuit had the authority to grant JMAL to Marley after it concluded Weisgram's evidence was legally insufficient to sustain the jury's verdict. The answer is clear: the court of appeals does have the power to grant JMAL in this case under the Constitution, the congressional grant of authority to appellate courts, under Rule 50 of the Federal Rules of Civil Procedure, and under the case law of this Court, of the Eighth Circuit, and of most of the other circuits which have addressed the issue.

The reasons petitioner has put forth in support of his position that a new trial is required are without merit and are contrary to the established case law of this Court under Rule 50 F.R.Civ.P. Contrary to Weisgram's contention, Rule 59(a)(1) F.R.Civ.P. does *not* require remand to the district court for a decision as to a new trial under these circumstances. Rule 50, not Rule 59, is controlling here, and it sets forth specific procedures for the court of appeals and the parties to follow where, as here, a district court errs in denying a defendant's motion for JMAL. These procedures were explained in detail in this Court's holding in *Neely v. Martin K. Eby Constr., Co.*, 386 U.S. 317 (1967).

Contrary to Weisgram's argument, allowing the court of appeals discretion to determine whether to grant JMAL or a new trial does not raise Seventh Amendment issues. Rather, exactly the opposite is true. This Court has specifically held, in a decision that has been continuously followed by the courts for over thirty years, that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial. *Neely*, 386 U.S. at 321-22. There is no constitutional bar to an appellate court granting judgment as a matter of law. *Id.*

Weisgram's argument that the court of appeals's exclusion of expert testimony before granting JMAL was "harsh" because it unfairly deprived him of his opportunity to be heard is equally unpersuasive and it is contrary to the record. Weisgram actually had a full and fair hearing of his case. He had several opportunities to be heard on the matter of his grounds for a new trial, if any, starting with the first time Marley moved for judgment as a matter of law at the close of plaintiffs' evidence. Contrary to Weisgram's suggestion, his brief in this Court was *not* his first opportunity to proffer his reasons for a new trial — Rule 50 and the case law of this Court set forth specific procedures for a verdict winner to follow when his or her opponent moves for JMAL. Despite the existence of these established rules and procedures, Weisgram and State Farm chose not to avail themselves of Rule 50(c) when Marley moved for JMAL in the district court, and chose not to invoke Rule 50(d) when Marley appealed the district court's denial of JMAL to the Eighth Circuit.

Since Weisgram never requested a conditional new trial, at either the district or the appellate court level, it is too late for him to raise the issue for the first time in his present brief to this Court. In *Neely* and the cases which follow it, this Court has repeatedly said it will not consider issues which were not presented to the court of appeals and which are not properly presented for review. *Id.* at 330.

There are no special circumstances in this case that would create an exception to the general rule giving federal appellate courts the discretionary power to fashion appropriate relief under the circumstances of the case pursuant to 28 U.S.C. § 2106 and this Court's holding in *Neely*. Judgment as a matter of law was one of the options available to the appellate court. The Eighth Circuit properly exercised its discretionary authority in directing it, after first completing a thorough review of the trial record.

Weisgram's suggestion that this Court ought to give him a "second chance" to prove his case by circumstantial evidence lacks merit for several reasons: (1) the Eighth Circuit already reviewed Weisgram's claimed circumstantial proof and found it deficient; (2) Weisgram's contention that he established a defect in the high-limit switch by circumstantial proof is contradicted by his own expert's concession at trial that the condition of the high-limit was consistent with a normal switch in a heater that was not running; and (3) the quantum of Weisgram's circumstantial proof is not an issue properly before this Court.

There is no reason to set aside the Eighth Circuit's judgment to allow the district court the initial opportunity to address the new trial question. *Neely* allows the court of appeals to consider the question "in the light of its own experience with the case." *Id.*, 329-30. The Eighth Circuit performed its duty in this regard and it addressed the question of granting Weisgram a new trial in its opinion.

The automatic retrial rule that Weisgram is advocating in this case emanated from the Eighth Circuit's 1973 decision in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir. 1973). The Eighth Circuit has rejected *Midcontinent's* rationale, refusing to follow it in *Wright v. Willamette*, 91 F.3d 1105 (8th Cir. 1996) and in the present case. Although the Fifth and Sixth Circuits had initially adopted *Midcontinent's* rule, both Courts have now disavowed it. In determining that its own precedent based on the *Midcontinent* rationale was no longer controlling, the Fifth Circuit observed that it "reflect[ed] a pre-*Daubert* sensibility."[15] In short, *Midcontinent's* rationale was misguided from the beginning and the other circuit courts are now openly criticizing it. It is time to put *Midcontinent* to rest.

[15] *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992 (5th Cir. 1997).

Finally, adopting the automatic retrial rule that Weisgram promotes would cause needless confusion in the federal courts that have been attempting to discern and apply this Court's *Daubert* philosophy. It would make no sense to instruct the courts on the one hand that an expert's opinion is inadmissible unless it has "a reliable basis in the knowledge and experience of his discipline,"[16] and then to inform them that if the trial judge should err in allowing the jury to hear unreliable testimony, the plaintiff must be rewarded with a new trial.

The Eighth Circuit did not abuse its informed discretion in granting JMAL to Marley. Its decision should be affirmed.

[16] *Daubert, supra*, 509 U.S. at 592, 113 S.Ct. at 2786.

ARGUMENT

I. The Eighth Circuit had the Power to Direct Entry of Judgment as a Matter of Law to Marley.

The petitioner has asked this Court to determine whether the Eighth Circuit could properly grant JMAL to Marley after determining the district court abused its discretion in admitting expert testimony and concluding that the plaintiff did not have sufficient evidence of defect or causation to support the verdict. The answer is an unequivocal "yes." This Court's decision in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 74 (1967) examined and settled the question whether the court of appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may direct entry of judgment for the defendant.

A. Congressional Grant of Authority

This Court concluded in *Neely* that Congress's grant of appellate jurisdiction to the courts of appeals "is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal." *Id.*, 322. The Court cited 28 U.S.C. § 2106, which provides broad authority to the appellate courts:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (citing *Bryan v. United*

> *States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950)). *Neely*, 386 U.S. at 322.

B. Constitutional Authority

Neely also settled the question whether there is a constitutional bar to an appellate court granting judgment as a matter of law. After reviewing the prior decisions of this Court before the adoption of the Federal Rules in 1938, this Court concluded "it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Id.*, 320-22.

C. Rule 50(d) Authorizes the Court of Appeals to Enter Judgment as a Matter of Law in Appropriate Cases

This Court's decision in *Neely* also resolved all doubt as to whether Rule 50(d) F.R.Civ.P. is applicable in cases such as this one, where the district court has denied a defendant's motion for judgment as a matter of law. Under these circumstances, *Neely* held that "Rule 50(d) is permissive in the nature of its direction to the court of appeals: . . . 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." *Id.*, 323-24.

In *Neely*, this Court determined that the Tenth Circuit's decision to grant the respondent judgment n.o.v. was appropriate because the court of appeals had determined that petitioner Neely did not have sufficient evidence to support her verdict. In that case, Neely, like Weisgram in this case, had suggested no grounds for a new trial in the event her judgment was set aside. Neely, like Weisgram, had argued the court of appeals had *no power* to direct entry of judgment for the respondent. *Id.*, 330. The Court rejected this view and

held that the court of appeals had properly exercised its discretion to order entry of judgment for the respondent after considering the new trial question in light of its own experience with the case.

Neely set forth this Court's view of proper practice under Rule 50(c) and (d). It instructs that in cases such as the present one, the verdict winner has three opportunities to argue why he or she would be entitled to a new trial should the judgment be set aside: (1) plaintiff may "bring his grounds for new trial to the trial judge's attention when defendant first makes an n.o.v. motion;" (2) "he may argue this question in his brief to the court of appeals;" or (3) "he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed." *Id.*, 328-29.

Similarly, in the present case, petitioner Weisgram had several opportunities pursuant to Rule 50 practice as outlined by *Neely* to suggest any grounds he may have had for a new trial should Marley succeed in having the verdict set aside in either the trial court or in the court of appeals. But Weisgram failed to do so. Since Weisgram, like the petitioner in *Neely*, suggested no grounds for a new trial in either the district court or in the court of appeals as required by Rule 50, it is too late to raise them now, for the first time, in his present brief in this Court.

In *Neely*, this Court saw no cause "for deviating from [its] normal policy of not considering issues which have not been presented to the court of appeals and which are not properly presented for review." *Id.*, 330 (citing Supreme Court Rule 40(1)(d)(2)). Similarly, in the case at hand, Weisgram has presented no good reason for this Court to deviate from its normal policy. Considering that Rule 50's procedures and *Neely's* clear instructions have been settled law for over thirty years, Weisgram's complaint in his brief that he has had no opportunity to be heard is unfounded.

II. Judgment as a Matter of Law was the Appropriate Disposition in this Case

Contrary to Weisgram's suggestion, there are no special circumstances in this case that take it out of the general rule granting federal appellate courts the broad discretionary authority to fashion whatever relief "may be just under the circumstances," including the power to direct entry of judgment as a matter of law for the defendant. See, 28 U.S.C. § 2106 and *Neely*, 386 U.S. 322. Directing judgment for Marley *was* just under the circumstances of this case.

A. The Eighth Circuit Evaluated Plaintiffs' Circumstantial Proof and Found it Wanting

Weisgram claims this Court ought to give him a "second chance" to prove his case by circumstantial evidence. *Pet. Br.*, 18-19, 28-29. The argument is without merit.

All of Weisgram's evidence, including any alleged circumstantial proof, was carefully examined, evaluated, and passed on by the Eighth Circuit under its *de novo* review of all the evidence pursuant to Marley's appeal from the denial of its motion for JMAL. The Eighth Circuit "view[ed] the evidence in the light most favorable to Chad Weisgram and State Farm." *Weisgram*, 169 F.3d at 516-17 (citing *Finley v. River N. Records, Inc.*, 148 F.3d 913 (8th Cir. 1998)). After considering all of the evidence, the court of appeals nevertheless concluded plaintiffs' entire liability proof was based on speculation, which has never provided "substantial evidence" to support a verdict in the Eighth Circuit. See, e.g., *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 640-46 (8th Cir. 1978) (substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility).

Weisgram made his case for circumstantial evidence, including his present argument that the panel majority "overlooked" or "misunderstood" his circumstantial proof, at pages 1-10 of his petition for rehearing and rehearing en banc. By denying the petition, the court of appeals concluded Weisgram had not offered a good reason for the court to deviate from the panel majority's finding that Weisgram's entire proof at trial was based on unsupported speculation and conjecture.

Contrary to the assertion on page 18 of petitioner's brief, Weisgram did *not* establish that the heater was defective in design and manufacture "because it did not shut off at 190° Fahrenheit." This statement in the brief, unsupported by citation to the transcript, misstates the record. Lazarowicz conceded on the witness stand at trial that the condition of the high-limit switch after the accident, specifically the absence of arc marks on the high-limit contacts, was consistent with Marley's explanation that the heater was *not running* at the time of the fire. *Laz.*, 83, 113-15. There were no arc marks because the high-limit switch was not called upon to open under power. [17]

There is no reason to vacate the Eighth Circuit's judgment to give Weisgram a "second chance" to prove his product liability claim by circumstantial evidence. The circumstantial evidence issue was fully reviewed and resolved by the court of appeals. That decision can only be set aside for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990).

Finally, the issue of Weisgram's quantum of circumstantial proof of defect and causation is not properly

[17] See also, *Phy*, 50-52. (The high-limit contacts in the Weisgram heater were clean and showed no evidence of a parting arc because the heater had never been subjected to a blockage and had never been called upon to cycle under current).

before this Court. The Court declined to grant certiorari on that issue in Weisgram's petition.

B. The Court of Appeals Considered the New Trial Question in Light of its own Experience with the Case.

At page 20 of his brief, Weisgram urges this Court to fashion a rule for instances when the appellate court determines the district court erred in admitting testimony. He suggests the verdict winner should be given an opportunity to show the district court why a new trial, without the excised testimony, is justified. Putting aside the problem that Weisgram never *asked* the court of appeals for a new trial nor set forth grounds for one, Weisgram's argument lacks merit because it presupposes that the court of appeals failed to *consider* the new trial question. The premise is false. The Eighth Circuit did consider whether Weisgram and State Farm ought to have another opportunity to make their case.

Neely instructs that it was "incumbent on the court of appeals to consider the new trial question in the light of its own experience with the case, even without a motion or other request from the petitioner to do so." *Id.*, 329-30. In *Neely*, this Court said that it would "not assume that the [court of appeals] ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question." *Id.* In the present case, there is no reason whatever for this Court to assume that the Eighth Circuit ignored its duty to consider the new trial question in light of its own experience because the Eighth Circuit *did* expressly deal with the issue in its opinion. The Eighth Circuit specifically considered and rejected the opportunity to exercise its discretion under Rule 50(d) to remand for a new trial. Based on its *own* experience with the record, the court found no reason to give Weisgram and State Farm "the

opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability." *Weisgram*, 169 F.3d at 517, n.2.

III. The Eighth Circuit's Holding is the Better Rule, in Harmony with this Court's Decision in *Kumho Tire* and with Well-Reasoned Opinions in the Other Circuit Courts

A. *The Decision Embodies this Court's Post-Daubert Philosophy*

The Eighth Circuit's decision to grant JMAL to Marley should be affirmed not only because the court of appeals properly exercised its discretion, but because the decision itself embodies the sound application of this Court's post-*Daubert* philosophy.

Contrary to Weisgram's argument at page 23-25 of his brief, the Eighth Circuit's directive to grant JMAL was *not* error, and was *not* in conflict with Eighth Circuit and other circuit court precedents. Quite the opposite is true. The *Midcontinent* line of cases that Weisgram suggests is controlling of the outcome here has been rejected by the Eighth Circuit and has been disavowed, if not outright overruled, in the other circuit courts that have followed this Court's post-*Daubert* philosophy. Quite simply, *Midcontinent* and its progeny are no longer good law in most of the federal circuits.

According to the petitioner's brief, *Midcontinent* would automatically require a new trial in every case where the district court or the appellate court determined that expert testimony, once let in, should have been excluded for unreliability or any other reason. *Pet. Br.*, 23-25. But this rationale directly contradicts the broad discretionary power granted to the federal courts of appeal under 28 U.S.C. §

2106, under this Court's holding in *Neely*, and under the express language of Rule 50(a), which allows only "legally sufficient" evidence to defeat a motion for JMAL. It also defies common sense, fundamental fairness, and the rule against two bites of the apple.

The Eighth Circuit rejected *Midcontinent's* rationale in *Wright v. Willamette*, 91 F.3d 1105 (8th Cir. 1996) when it held that judgment as a matter of law for the defendant, not a new trial, was the appropriate disposition where plaintiffs' expert testimony on causation was "simply speculation" and, as a result, the plaintiffs failed to carry their burden of proof at trial on the issue of causation. *Id.*, 1108. In *Weisgram*, relying on *Wright*, the Eighth Circuit again firmly rejected the *Midcontinent* rationale when it expressly considered granting a new trial to the plaintiffs, but refused to do so, finding no reason to reopen discovery where Weisgram and State Farm had had their day in court. *Weisgram*, 169 F.3d 517.

Other circuit courts in the post-*Daubert* era have reached the same conclusion as the Eighth Circuit — that *Midcontinent* and its progeny should no longer be controlling when Rule 702 and *Daubert's* reliability criteria are applied to screen unreliable expert testimony at the gate. In *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) the court of appeals affirmed the district court's decision to grant JMAL to Telsmith after excluding the testimony of Watkin's expert, an engineer, because he had insufficient experience with the design of a conveyor system to offer a reliable expert opinion. *Id.*, 987-88. The Fifth Circuit held that, without the expert testimony, Watkins had not produced sufficient evidence of product defect to survive a motion for JMAL. *Id.*, 991-93.

In determining that JMAL was the appropriate disposition, the Fifth Circuit considered Watkin's argument that *Dixon v. International Harvester Co.*, 754 F.2d 573, 579 (5th Cir. 1985) — one of *Midcontinent's* progeny and one of the cases Weisgram has cited to this Court as controlling the

outcome here — required a new trial. The Fifth Circuit rejected the notion that Watkin's expert's testimony should have been considered in ruling on the motion for JMAL. It concluded that *Dixon* was *not* controlling, saying that "the opinion's emphasis on qualifications over reliability of the expert testimony reflect a pre-*Daubert* sensibility." *Id.*, 992. In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1173, 143 L.Ed. 2d 238, 249 (1999), this Court cited with approval *Watkin's* holding that *Daubert* applied to engineering testimony.

Even though the *Weisgram* decision predated *Kumho* by a few weeks, the Eighth Circuit had already held that *Daubert* applied to engineering and other technical testimony. *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296-98 (8th Cir. 1996), cert. denied, 520 U.S.1196, 117 S.Ct. 1552, 137 L.Ed. 2d 701 (1997) (affirming summary judgment for the defendant after the district court determined plaintiff's expert testimony was inadmissible), *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382 (8th Cir. 1995) (evidence of expert's proposed alternative design excluded on the basis of *Daubert*).

The Eighth Circuit's decision to grant JMAL to Marley after determining that the district court had abused its wide discretion in admitting expert testimony based on "rampant speculation" is in harmony with this Court's decisions in *Daubert, Joiner,*[18] and *Kumho Tire. Kumho Tire* clarified that *Daubert's* gatekeeping obligation applies to *all* expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard of review.

In *Weisgram,* the Eighth Circuit explained that it was following *Joiner* precisely when it concluded that the nexus between Lazarowicz's observations of the contacts and his conclusion that the heater was defective was not scientifically

[18] *General Electric Co. v Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed. 2d 508 (1997).

sound. Finding "simply too great an analytical gap between the data and the opinion proffered," the Eighth Circuit concluded that the district court abused its considerable discretion in allowing the testimony. *Weisgram,* 169 F.3d at 521. As Justice Scalia noted in his concurring opinion in *Kumho Tire*, "trial court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function." *Kumho,* 119 S.Ct. at 1179, 143 L.Ed. 2d at 256-57.

The Eighth Circuit concluded that the district court did abandon its gatekeeping function in sending rampant expert speculation to the jury. Judgment as a matter of law was the only appropriate remedy when Weisgram and State Farm failed to meet their burden of proof of defect and causation with legally sufficient evidence.

B. The Decision is in Harmony with Well-Reasoned Post-Daubert Decisions in Other Circuit Courts

Other circuit courts that have adopted this Court's philosophy that *Daubert* applies to *all* expert testimony have not hesitated to grant JMAL to the defendant after excluding unreliable expert testimony.

In *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1996), the district court granted defendant's motion for JMAL at the close of plaintiff's case in chief, after excluding as unreliable the proposed testimony of plaintiff's expert and finding that, without it, plaintiff had failed to establish the defendant's standard of care, an essential element of the plaintiff's case. The First Circuit affirmed JMAL after reviewing the record and concurring that the plaintiff had failed to present admissible evidence of the standard of care after the expert testimony was excluded. See also, *Tokio Marine & Fire Insurance Co. v. Grove Manufacturing Co.*, 958 F.2d 1169 (1st Cir. 1992) (granting

judgment as a matter of law to the defendant was not an abuse of discretion where the district court refused to qualify plaintiff's liability expert).

The Third Circuit, like the Fifth Circuit in *Watkins v. Telsmith, supra*, has been openly critical of *Midcontinent* and its progeny, calling the rationale a "classic case of precedential inbreeding where decisions multiply and parrot a holding, with no court pausing, first, to identify the competing social, public, or private interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 115 (3rd Cir. 1987). The *Aloe* court specifically criticized *Midcontinent's* reliance-based rationale, observing that it did not address the "competing reliance concerns of the defendant, or the home-spun axioms that a litigant is only entitled to one bite of the apple or to only three strikes at bat." *Id.*, 116. Although *Aloe's* criticism of *Midcontinent* was dicta, the Third Circuit followed *Aloe* and rejected *Midcontinent* in its later holdings: see, e.g., *Lippay v. Christos*, 996 F.2d 1490 (3rd Cir. 1993) (clarifying that in considering a post-trial motion for a new trial, the court was free to consider the abridged record) and *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993) (holding that courts of appeals may not consider inadmissible evidence in reviewing the sufficiency of the evidence on a motion for JMAL, and criticizing *Jackson v. Pleasant Grove* and *Douglass v. Eaton Corp.* for holding contra).[19]

After Marley pointed out in its response to Weisgram's petition for certiorari that *Douglass* was no longer good law in the Sixth Circuit as it had been overruled by *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299 (6th Cir. 1997), Weisgram argued in his present brief that *Smelser*, too, is error. But Weisgram failed to inform this Court that his claimed support in the Fifth Circuit from the cases of *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215 (5th Cir. 1983) and *Dixon v. International Harvester Co., supra*, is no longer controlling law in that circuit. These cases were expressly overruled in *Watkins v. Telsmith, Inc.*, 121 F.3d at 991-92.

The Seventh Circuit has not hesitated to grant JMAL for the defendant where plaintiff's expert testimony was merely subjective opinion. *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1994) (affirming district court's grant of JMAL for defendant manufacturer after excluding expert's testimony because it lacked scientific methodology); *Navarro v. FUJI Heavy Industries, Ltd.*, 117 F.3d 1027 (7th Cir. 1997) (affirming trial court's grant of summary judgment for defendant manufacturer because plaintiff's expert's opinions were not grounded in "an expert study of the problem.")

As the above-cited circuit court cases demonstrate, there is no merit to Weisgram's assertion that the Eighth Circuit's failure to follow *Midcontinent* was reversible error. To the contrary, *Midcontinent's* rationale has been roundly criticized by the Third Circuit and the Fifth Circuit. The Sixth Circuit, which once followed it, has similarly rejected it.

The Eighth Circuit's decision in *Weisgram* clearly reflects the better rule. The circuit courts following *Daubert* have not hesitated to grant JMAL to the defendant in instances where plaintiff's expert proof consists of mere speculation or unscientific opinion. Where, as here, a plaintiff has been fully heard and is still unable to meet his burden of proof with legally sufficient evidence, the appropriate remedy is judgment as a matter of law.

[19] Weisgram has cited both *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695 (11th Cir. 1993) and *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992) in support of his contention that this Court should adopt the *Midcontinent* rationale.

IV. The Eighth Circuit's Decision should be Affirmed on Policy Grounds

The rule that Weisgram has advocated to this Court in its brief — a rule that would require a new trial in every case where a district court or appellate court determines that expert testimony should have been excluded as unreliable — contradicts the authority of federal appellate courts to grant judgment as a matter of law under Rule 50 and under this Court's holding in *Neely*. Such a rule would also surely cause needless confusion within the federal court system. An automatic retrial rule would seriously undermine this Court's holdings in *Daubert, Joiner,* and *Kumho Tire*. District court judges might hesitate to find expert testimony unreliable after the jury has heard it because the result would mean an automatic retrial, even if the plaintiff had failed to carry his burden of proof. Similarly, the appellate courts might hesitate to hold that a district court abused its discretion in admitting expert testimony because the end result would only reward the plaintiff with a new trial, regardless of whether the plaintiff had proved his case with other legally sufficient evidence.

Under the Eighth Circuit's holding in *Weisgram,* on the other hand, a plaintiff in a product liability case would have a strong incentive to proffer reliable experts and to try his best case, knowing that he would surely face summary judgment or JMAL if his expert were unable to pass muster under *Daubert.*

As the Third Circuit aptly noted in *Aloe Coal Co.*, 816 F.2d at 115-16, the courts that simply "parroted" *Midcontinent's* rationale never adequately analyzed the policy considerations that would flow from a rule requiring new trials whenever expert testimony is admitted, then later excluded. And Weisgram did not address them here. Adopting *Midcontinent* in the post-*Daubert* era would cause perverse repercussions and would tend to undo the salutary

effects that *Daubert's* insistence on a reliable basis for expert testimony has wrought.

CONCLUSION

The Eighth Circuit granted judgment as a matter of law to Marley because it rightfully concluded this was the appropriate disposition after determining that State Farm and Weisgram had been fully heard and had presented no legally sufficient evidence in support of the verdict. This decision was based on valid Eighth Circuit precedent, Rule 50, and this Court's time-honored decision in *Neely.*

The Eighth Circuit's decision should be affirmed.

Respectfully submitted.

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