No. 99-161

In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.,

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

Contrary to the suggestions made in the briefs of respondents and their *amici*, petitioner does not advocate an "automatic retrial" rule. Petitioner does contend that the Eighth Circuit panel majority erred by ordering JAML on a truncated, hypothetical record. The question in this case is what a federal appellate court should do after finding certain testimony inadmissible. Petitioner contends that the better rule is that the case should be remanded to the district court for further proceedings consistent with the evidentiary rulings of the court of appeals. This may, or may not, result in a retrial on some, or all issues.

This better rule comports with the language of Rule 50, the weight of prior precedent interpreting Rule 50, and the constitutional constraints imposed by the Re-Examination Clause of the Seventh Amendment. It obviates the fundamental unfairness of a federal appellate court summarily ordering judgment against the party who has prevailed at all earlier stages of the proceedings, who has relied on the evidentiary rulings of the district court, and who has not had a realistic opportunity to be heard on whether it can cure the defects found by the appellate court. This better rule takes advantage of the fact that in such situations, the district court is in the best position to preside over further proceedings aimed at deciding whether a retrial is appropriate. Further, it serves to promote judicial efficiency.

ARGUMENT

I. THE TEXT AND HISTORY OF THE RULES, AND THE WEIGHT OF EXISTING PRECEDENT, BAR A FEDERAL APPELLATE COURT FROM GRANTING JAML BASED ON A HYPOTHETICAL RECORD

The question on which this Court granted review is not whether an "automatic retrial" is the remedy for any evidentiary error at trial. The question is whether the Eighth Circuit erred in "excising portions of [petitioner's] experts' testimony *before*

ruling on respondents' JAML motion — thereby deciding that motion on a truncated, hypothetical record instead of on the record actually considered by the jury. Pet. i.

One of respondents' *amici* argues that "to look only at the record as it existed at the end of trial, regardless of the actual admissibility of the evidence, artificially confines an appellate court's Rule 50 inquiry." Brief *Amicus Curiae* for Brunswick Corporation in Support of respondents ("Brunswick Br.") at 15-16. This argument ignores the historical origins of Fed. R. Civ. P. 50, the text of the rule, and this Court's unanimous decision in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251 (1940).

In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-87, 395-400 (1913), this Court held that the Re-Examination Clause of the Seventh Amendment bars a federal court from taking a case away from a jury on sufficiency-of-the-evidence grounds except on a motion brought during trial. Motions filed after trial, the Court held, cannot serve as a vehicle for sufficiency analysis. This holding remains good law. Post-verdict JAML motions may constitutionally be entertained only to the extent that a JAML motion is made *before* the verdict, on the *entire* trial record, and the decision of that motion is reserved until after the verdict. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 658-61 (1935). Since *Redman*, the lower federal appellate courts have issued dozens of decisions strictly enforcing this requirement. *See, e.g., Sweeney v. Westvaco Co.*, 926 F.2d 29, 37 (1st Cir.) (Breyer, J.), *cert. denied*, 502 U.S. 899 (1991); *Eastern Natural Gas Corp. v. ALCOA*, 126 F.3d 996, 1000 (7th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53-54 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1180 (3d Cir.), *cert. dismissed*, 510 U.S. 1021 (1993); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 n.17 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See generally* 9A CHARLES ALAN WRIGHT and ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2537, at 343-48, 355-56 (1995).

Rule 50, promulgated by this Court three years after the *Redman* decision, carries out the *Redman* framework. However "artificial" in its operation, the rule explicitly requires that at the post-verdict stage a federal appellate court must limit itself to ruling on the original motion based on the facts as contained in the record at the end of the trial. Rule 50(a)(2) requires that a JAML motion be made "before submission of the case to the jury," specifying both "the law and the facts" under which the movant is entitled to judgment. Rule 50(b) states that if the district court "does not grant" a JAML motion "made at the close of all the evidence," the matter is automatically deemed reserved until after the jury's verdict, and "[t]he movant may *renew* its request" for JAML after trial (emphasis added).

Thus, both the language of Rule 50(b) and the history leading up to it stand in the way of any theory that after making a Rule 50(a) motion based on the actual trial record, a judgment loser may ask a federal appellate court to grant JAML based on a *new* record — a record never considered by the jury — created by deleting certain evidence on the ground that the district court erred in admitting it. Under Rule 50(b), JAML cannot be granted on appeal simply because the appellate court concludes that certain evidence actually heard by the jury should not have been admitted. JAML may not be granted unless the JAML movant demonstrated during the trial, in its Rule 50(a) motion, that it was entitled to judgment based on "the facts" actually contained in the record at the end of the trial.

This Court's decision in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940), issued just two years after promulgation of the Federal Rules of Civil Procedure, confirms this reading with respect to the distinct functions of Rule 50(b) and Rule 59(a) motions. In its first holding in *Montgomery Ward*, this Court stated that post-trial arguments "that the court erred in rulings on evidence" are appropriate on a motion for a new trial under Rule 59(a), but are "not appropriate to be considered in connection with the motion for judgment" under Rule 50(b). *Id.* at 249.

In its second and main holding, this Court further explicated the function of a Rule 50(b) JAML motion — to test the sufficiency of the evidence on the record actually presented to the jury — and its relation to a Rule 59(a) new trial motion. In doing so, it emphasized that "[e]ach motion . . . has its own office." *Id.* at 251. Respondents and their *amici* analyze neither of these holdings in *Montgomery Ward*.[1]

In substance, Rules 50(b) and 59(a) remain the same as they were when this Court decided *Montgomery Ward*, just after the rules were instituted. *Montgomery Ward* sets forth a bright-line rule under which Rule 50(b) JAML motions are decided on the evidence presented at trial, and claims of evidentiary error are decided in connection with Rule 59(a) new trial motions.

For more than half a century following this Court's decision in *Montgomery Ward*, until 1993, this bright-line division between the function of a Rule 50(b) motion (to test the sufficiency of the evidence actually admitted) and the function of a Rule 59(a) motion (to provide a new trial as a remedy for evidentiary errors, and for other reasons) was uniformly enforced in the federal courts. On those rare occasions where district courts confused the motions and made Rule 50(b) determinations not on the actual record at trial but only after deleting evidence that had been erroneously admitted to create a truncated record, the federal courts of appeals always reversed,[2]

[1] Respondents' *amici* simply assert that this analysis of the rules was *dicta*. Brunswick Br. at 9 n.4; *Amicus Curiae* Brief of the Product Liability Advisory Council, Inc., in Support of Respondents ("PLAC Br.") at 7-8. They are wrong.

[2] *See Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993). One of the *amicus* briefs filed in support of respondents cites three cases predating *Midcontinent Broadcasting* that assertedly illustrate an approach contrary to that set out in *Montgomery Ward*. Brunswick Br. at 7-8. All three

in line with the analysis of the rules set out by leading authorities on federal practice.[3]

Since 1993, there have been only three federal appellate decisions (including the decision below) analyzing even briefly this Rule 50(b) issue and holding that JAML motions may be decided on truncated, hypothetical records.[4] By contrast, in the past two years, two more circuits have adopted the traditional bright-line rule that bars deciding JAML motions on a hypothetical record. *Kinser v. Gehl Co.*, 184 F.3d 1259, 1267 (10th Cir. 1999); *Elbert v. Howmedica, Inc.*, 143 F.3d 1208, 1209 (9th Cir. 1998) (en banc); *Schudel v. General Elec. Co.*, 120 F.3d 991, 995-96 (9th Cir. 1997).

cases upheld a Rule 50(b) grant of judgment notwithstanding the verdict based on a finding, on the *entire* record considered by the jury (without deleting any evidence), that the evidence was insufficient to prove the fact(s) at issue. They are entirely consistent with the *Montgomery Ward* analysis.

[3] *See* 21 CHARLES ALAN WRIGHT and KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5041, at 229-30 (1977) (although a claim of evidentiary error at trial may "be the basis of a motion for a new trial," a federal 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."); *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 95, at 676-77 & n.3, 682-83 (5th ed. 1994) ("Wright").

[4] The other decisions, both from the Third Circuit, are *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1198-1200 (3d Cir. 1993), and *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993). Two additional decisions issued by the federal circuit courts of appeal since 1993 have allowed the grant of JAML based on artificially truncated records. But these did so without *any* analysis of the Rule 50(b) issue, or even an indication that such an issue exists (the parties apparently not having briefed the issue). *See Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (departing from prior circuit precedent without analysis); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 306 (6th Cir.) (departing from prior circuit precedent without analysis), *cert. denied*, 522 U.S. 817 (1997).

Thus, the text of Rule 50, its history, its contemporaneous interpretation by this Court in *Montgomery Ward*, and the overwhelming weight of authority in the lower federal appellate courts since then, all rebut the argument of respondents and their *amici* that the federal appellate courts enjoy a power under Rule 50(b) to grant JAML motions, without a remand, based on an analysis of a truncated, artificial, hypothetical record never considered by the jury.

II. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT REQUIRES RESOLVING ANY DOUBT AGAINST THE NOVEL MODE OF APPELLATE REVIEW EMPLOYED BY THE EIGHTH CIRCUIT BELOW

Even if the language of the relevant rules could somehow be read to permit federal appellate courts to delete certain record evidence before making JAML determinations, the "hypothetical record" theory advanced by respondents and their *amici* cannot be squared with the Re-Examination Clause of the Seventh Amendment, as most recently explained by this Court in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Except for the PLAC *amicus* brief, respondents and their *amici* ignore both the Seventh Amendment and *Gasperini*.[5]

PLAC's Seventh Amendment argument is premised on an unduly narrow view of this Court's *Gasperini* decision. PLAC suggests that *Gasperini* involved only the issue of "the Seventh Amendment's bearing on the allocation of authority as between trial courts and appellate courts to review verdicts." PLAC Br. at 27. In fact, *Gasperini* involved the broad, long-accepted

[5] PLAC devotes several pages to its view that petitioner is arguing that the Eighth Circuit violated the Seventh Amendment "in excluding the testimony" of petitioner's experts. PLAC Br. at 21; *see also id.* at 20-24. This is not our argument (we recognize that this Court did not grant review of the admissibility issue presented in the petition) so we do not address these pages of PLAC's brief.

principle that the Re-Examination Clause of the Seventh Amendment bars the use of any mode of federal appellate judicial review of jury verdicts that was not used at English common law circa 1791.

The Re-Examination Clause states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It is a "substantial and independent clause" that this Court has indicated is, if anything, "more important" than the preceding portion of the amendment, as it imposes "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner" than through the "modes known to the common law." *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447-48 (1830)(Story, J.); *see also Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

In *Gasperini*, the Members of this Court disagreed over two questions: (1) whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard; and (2) whether adopting such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts. But no Member of the Court disputed the conclusion that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review, as this mode of appellate review of jury verdicts was unknown to the common law. [6]

[6] See *Gasperini*, 518 U.S. at 434-38 (1996) (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id.* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any

The Re-Examination Clause of the Seventh Amendment bars any reading of the rules that might permit the "hypothetical record" approach to JAML rulings adopted by the Eighth Circuit below, and found in a handful of other federal appellate decisions issued during the last six years. Plainly, at common law, motions for judgment were decided on the record *actually* considered by the jury. Of course, "[a]t common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved," *Redman*, 295 U.S. at 659, a practice that makes Rule 50(b) compatible with the Seventh Amendment. *See id.* at 657, 660-61; s*ee also* Wright, *supra* note 3, § 95, at 682-83.

By contrast, respondents and their *amici* have cited not a single case decided at common law prior to 1791 in which any court attempted, after the jury issued its verdict, to artificially truncate the record and rule on a hypothetical record different from what was before the jury. Neither respondents nor their *amici* claim that this approach is anything but a recent innovation that was first attempted in the federal courts in the early 1970s and that was first implemented in the early 1990s. This approach therefore violates the plain language of the Re-Examination Clause of the Seventh Amendment. And its use in this case, by a federal *appellate* court, violates the well-recognized, core purpose of the clause: to strictly confine the power of appellate courts over jury factfinding. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-32, at 616, 623-25 (3d ed. 2000).

appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

III. PETITIONER SHOULD HAVE THE OPPORTUNITY TO ARGUE TO THE DISTRICT COURT THAT THE RECORD VOID CREATED BY THE EIGHTH CIRCUIT CAN BE FILLED, AND THAT FURTHER TRIAL PROCEEDINGS ARE WARRANTED

A. It is Fundamentally Unfair To Deny the Party That Prevailed Below A Reasonable Opportunity to Argue For A New Trial

The unfairness of respondents' position and the ruling of the Eighth Circuit panel majority can be demonstrated by a thought experiment that reverses the position of the parties below. Suppose that, over plaintiff's objection, the defense had introduced (and the trial court admitted) improper testimony from several proffered defense "experts," and a defense verdict on liability had been rendered by the North Dakota jury. If, following unsuccessful post-trial motions, plaintiff succeeded in convincing the appellate court to excise certain defense expert testimony, could the appellate court then simply direct entry of judgment for the plaintiff on the issue of liability? One can imagine the protest from the defendant that it had no opportunity to return to the trial court to even suggest that the plaintiff's case was still too weak to result in a verdict, or that the defense should (in the face of the previous defense verdict) at least be given the chance to defeat the plaintiff again before a jury.

No one — let alone the appellate court on a cold record — can tell why a jury decided as it did, let alone what it could properly decide on a different (and proper) record. There is no way of knowing (as the Eighth Circuit panel majority arbitrarily assumed here) that the jury found as it did because of the excised testimony. This is especially true under North Dakota law because, as the Eighth Circuit panel majority omitted to report, common law in that state permits a product defect finding on circumstantial evidence alone. *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). Expert testimony may

be superfluous or petitioner may be able to find new and proper experts. It is inescapable that the Eighth Circuit panel majority here assumed that petitioner *would* not and *could* not have prevailed without the excised testimony. That assumption is as speculative as it is false. Petitioner was never given the opportunity to demonstrate that point either from the remaining record or by proffers of additional witnesses or other evidence. This is fundamentally unfair. The better rule would at least afford him that opportunity.

Fundamental fairness requires an opportunity to be heard at a time when the litigants are at least aware of the details of the excluded evidence, so that the litigant who relied upon the inclusion of that evidence at trial can thoughtfully describe to the court the implication of the ruling[s] just made. Such arguments and briefing should not be made in a vacuum (that is, before the decision to exclude has been announced), as respondents contend should have occurred here.

Indeed, the only other federal circuit court of appeal that has ever permitted use of the "hypothetical record" theory and has offered any analysis of what it was doing — the Third Circuit, see p. 5 & note 4, *supra* — has indicated that with any use of this theory should come deference to the analysis of district courts on factual points. Thus, in its first decision upholding the use of this approach to JAML motions, in a case where it held that the district court's erroneous admission of hearsay testimony had been prejudicial, the Third Circuit, did not articulate this JAML approach as one to be followed by an *appellate* court after ruling testimony inadmissible on appeal. It stated that it was "reluctant to make the initial determination" of JAML after its exclusion of the hearsay testimony, and it then remanded on its belief "that the district court should have the first opportunity" to assess the JAML motion on the changed record. *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993) (cited in Respondents' Br. at 28). The *Lippay* court also stated that if the district court denied the motion for JAML, then the proper remedy would be a new trial. *Id.* That approach should be adopted here.

For a federal appellate court to make the new trial decision as part of its rendering of an opinion on the admissibility issue, without further briefing, is for it to make the decision without the benefit of meaningful argument from counsel. Such a procedure violates fundamental fairness and unnecessarily invites error which often could have been easily avoided if the parties had been given an opportunity to provide argument in light of the changed circumstances in the case.

B. Under These Circumstances the District Court is in the Best Position To Determine Whether Further Proceedings Are Warranted

The briefs of the parties in this Court, especially that of the respondents, demonstrate the error of the Eighth Circuit panel majority in attempting to determine whether a new trial should have been awarded. A reading of these briefs makes it clear that the parties have wholly different views of the evidence and the inferences to be drawn from the evidence. Although the factual issues are not before this Court, the respondents' brief does contain numerous misleading characterizations of the evidence presented at trial. To point out the contentiousness of these issues, petitioner will mention only the most egregious misrepresentations of the facts.

First, respondents claim that Bonnie Weisgram died several hours before the fire started in the entryway. Respondents' Br. at 1. The Coroner determined that she died somewhere between 12:30 a.m. and 4:30 a.m. on December 30, 1993. Vol. II, pp. 32-33, 47-48. Captain Freeman testified there were two separate fires in Bonnie Weisgram's home which went through four distinct stages. Freeman, pp. 175-77. The first stage lasted "an hour or two" before it ignited the livingroom couch. *Id.* at 186. The smoldering fire in the couch (stage 2) lasted at least two to three hours before it used up most of the oxygen inside the home. *Id.* at 74-75. Finally, the flaming fire in the entryway (stage 4) lasted an additional hour or two before it was discovered by an off-duty firefighter. *Id.* at 186. Thus, the

evidence showed that the initial entryway fire started at approximately 2:30 a.m., well within the range for Bonnie Weisgram's time of death as set by the coroner.

Second, respondents suggest that Dolence only works as a consultant for plaintiffs' attorneys regarding product-related fires. Respondents' Br. at 3, note 3. Dolence was originally contacted by the Fargo Fire Department, not petitioner, to investigate the cause and origin of the fire. Freeman, pp. 79-81. Moreover, Dolence had previously been retained by respondents themselves, prior to his involvement in this case, to investigate a fire allegedly caused by another Marley product. Dolence, pp. 18-19.

Third, respondents gratuitously describe Bonnie Weisgram's body as "testing positive for a toxic amount of antidepressants". Respondents' Br. at 1. In truth, petitioner presented expert testimony of a toxicologist at trial who explained to the jury that the toxicology finding was of no medical significance. Vol. IV, pp. 35-37. For many years, Bonnie Weisgram, a music teacher for the Fargo Public School system, had been properly prescribed and was taking a prescription drug, amitriptyline, for a painful muscle condition. Vol. IV, p. 33. It also operated as a sleeping aid. Vol. IV, pp. 25-32. Significantly, the toxicologist described that, postmortem, this medication is known to "redistribute" from muscle tissue to the blood stream, leading to the appearance of higher than normal levels at autopsy. Vol. IV, pp. 35-37. Respondents never challenged the toxicologist's explanation, and the jury obviously concluded that the medication played no part in this fire.

Much, if not most, of the brief of the respondents is devoted to attempting to establish to this Court that there was insufficient evidence to go to the jury, once the Eighth Circuit panel majority had determined that certain of the expert testimony proffered by petitioner should have been excluded. The difficulty with this approach is that it essentially requires this Court, as it required the court of appeals, to review what all of the evidence indicates and then determine whether a reasonable

juror could have found both that the fire was caused by the heater manufactured by respondents and that the heater was defective. At the very least, it should be apparent, since the evidence that was improperly admitted (according to the Eighth Circuit panel majority) related only to the issue of defect, that the question of whether the jury properly found the heater was the cause of the fire, whether defective or not, does not remain as a substantial issue in the case.

While respondents labor mightily to show there was insufficient evidence of defect, it is a labor neither this Court nor the court of appeals should undertake in the first instance since both courts have, at best, a paper record before them with an incomplete sense of what the jury saw and heard, and no sense of the pretrial proceedings. For this reason alone, the decision to order JAML and not remand to the district court for further proceedings was error.

But petitioner need not rest on that proposition alone. This case does not simply involve the question of whether the trial record presented by the prevailing party to the jury was sufficient as a matter of law. In this case, there is another question that must be addressed, and on this question the court of appeals is simply in no position to make an educated or even an uneducated guess. That question is whether, under all the circumstances, petitioner should be entitled to present additional evidence at a second trial that he was not able to offer, or chose not to present at the first trial, because of the favorable rulings of the trial court in admitting evidence which was subsequently excluded by the court of appeals. Because the court of appeals had no involvement whatsoever with pretrial matters, nor has petitioner ever been given a realistic opportunity to make a proffer of additional evidence that it would now offer in light of the rulings of the court of appeals, the question of whether a new trial will occur will not simply be based on what occurred at the first trial, but upon what might take place at a subsequent trial. On that issue, the court of appeals is completely without guidance since it had no way of knowing what evidence was not

presented, nor what could be presented at a subsequent trial since the record before it is completely silent on both points.

The trial court knows state law. The trial court understands its calendar and schedule. The trial court saw and heard all the evidence and testimony. The trial court is uniquely positioned to determine whether enough substantive evidence remains, or can reasonably be produced, to proceed to trial, and on what issues. At a hearing in the district court, a thorough record can be made. A new *Daubert* hearing may be in order. All litigants could research and assess the implications of the excluded testimony, and then a thoughtful decision could be made capable of appellate review. No such arguments were made. No such thoughtful review was made. We have no such record here.

IV. PETITIONER'S ONLY REALISTIC OPPORTUNITY TO PRESENT HIS ARGUMENT FOR A NEW TRIAL IS IN PROCEEDINGS BEFORE THE DISTRICT COURT AFTER THE APPELLATE COURT RULING

Respondents and especially their *amici* attempt to downplay the harshness of allowing the court of appeals to end the case without even affording the verdict winner below an opportunity to argue for another trial, by suggesting that petitioner had three such opportunities and failed to take advantage of any of them by presenting persuasive evidence to support a new trial. Under this theory, the first opportunity was when respondents moved for JAML in the district court, the second opportunity was on appeal when the argument could have been included in petitioner's brief as the appellee, and the third opportunity was as part of the petition for rehearing. None of those opportunities would afford a meaningful procedure by which the issue of a second trial under the circumstances of this type of appellate reversal should be decided.

It is vital to recall that there are many reasons in any given case why a court of appeals might reverse a jury verdict, and the reversal in this case deals with only one limited category: when the trial court admits evidence offered by a party, who then

obtains a favorable jury verdict, which is overturned on the ground that the evidence should not have been admitted. The problem of what to do in this precise situation arises out of the fact that the appellate court is being asked to decide a question never presented to the district court because that court admitted the now excluded evidence. To answer that question, it is necessary to determine what other options the verdict winner had and either chose not to exercise (in order to limit the trial to its essentials) or did not consider because of the prior rulings of the trial judge. Moreover, to answer those questions, it is necessary to know not just what objections the verdict loser was making, but which ones the appellate court would accept and, most significantly, on what rationale. Until that information is known, the verdict winner is in no position to make a proffer as to what a new trial would look like and how it would not run afoul of the ruling of the appellate court.

It is principally because the appellate court will not yet have ruled that the first two "opportunities" are simply not viable in this situation. A litigant has no way to anticipate each detail of an appellate court's rulings with sufficient clairvoyance to pre-brief and argue the implications of those rulings before they are announced. In addition, respondents would effectively require the verdict winner to argue against itself, by both defending the rulings being challenged and then asking for the mercy of a new trial if those arguments are rejected. No advocate should be placed in that position. Indeed, Rule 50(c)(2) of the Federal Rules recognizes that inherent dilemma and allows a motion for a new trial by the verdict winner to be made up to 10 days *after* a trial judge decides to grant JAML.

The third "opportunity" is not any more realistic, but for different reasons. Surely the verdict winner will no longer have to argue against its own interests, and counsel will know why the verdict was set aside and hence what the grounds rules are for any new trial. The problem is that the court of appeals will almost certainly lack the information about what transpired in the district court, such as whether other witnesses were available but not called (as in this case) and if not why not, and what

alternatives the verdict winner had to prove its case, such as use of circumstantial or other direct evidence that was not introduced in light of the rulings of the trial judge admitting the now-excluded evidence. Some of this information may be in the record of the district court, but may not be part of the record on appeal because it did not bear on the issues on which the appeal focused. Other parts may be in the court reporter's notes that no one asked to be transcribed, and others may never have been recorded anywhere, or even communicated to the trial court. Furthermore, all of that information would have to be considered in light of the ruling of the court of appeals, which could not be done until after the decision is rendered.

In addition to the evidence that was available, but not needed in the first trial, another significant way in which a verdict winner will be able to proceed to trial again and to prevail at one is by presenting more detailed qualifications from the excluded expert and/or having the excluded expert perform additional testing to satisfy the concerns of the appellate court. Yet another way to prevail at a second trial is by obtaining new evidence – in this case in the form of new experts – who will meet the objections of the court of appeals. According to respondents and their *amici*, this information should have been set forth in the petition for rehearing that must be filed within 14 days of the decision of the appellate court. Assuming that a verdict winner can meet what in most cases will be a nearly impossible schedule, absent a lengthy extension, that is simply the beginning of the process. Surely, the successful appellant will not just accept new expert testimony on its face, but will insist on taking discovery of the expert and demanding a *Daubert* hearing. The verdict winner could not reasonably oppose such requests, and no court should decide on a new trial in these circumstances without hearing both sides.

The fallacy in respondents' argument is its suggestion that the court of appeals is the place where those proceedings should take place. To the contrary, both because the district court may have some of the needed information from the prior proceedings (and/or can get it easily), and because issues relating to

discovery and admissibility of expert testimony are the province of the trial court in the first instance, it simply makes no sense to force proceedings of this kind into a rehearing process in the court of appeals, when that court is in no position to make the kind of nuanced judgment about whether a new trial should be granted that the trial court can and should do. In the process of deciding whether further proceedings are warranted in the interests of justice, the trial judge is in the best position to weigh the competing equities, including the reliance interests of both sides. Moreover, because the trial judge will have to sit through any retrial, the trial judge will certainly not bend over backwards to have a new trial unless he or she is convinced that there is a reasonable likelihood that a new trial will produce a verdict that is capable of being sustained on appeal. Therefore, contrary to the contentions of respondents and their *amici*, petitioner has not had a realistic opportunity to present reasons why further proceedings are warranted.

V. THE EFFICIENCY ARGUMENT ADVANCED BY RESPONDENTS AND THEIR *AMICI* IS MISTAKEN

Respondents and their *amici* also urge that allowing appellate courts to order JAML on an artificial, truncated record, as did the Eighth Circuit below, promotes efficiency. Brunswick Br. at 26-27, 29-30; PLAC Br. at 17; Respondents' Br. at 30. But the suggested efficiency gains of abandoning the traditional approach to JAML practice are illusory. The traditional rule does *not* mandate "automatic retrial." If the evidence that was presented at trial, after deletion of the improperly admitted evidence, is insufficient to create a factual issue for trial, and if the plaintiff does not produce in compliance with the rules other evidence to fill the gap, then the defendant need only file a summary judgment motion to end the case. No rewriting of Rule 50(b) is needed to avoid pointless and wasteful "automatic retrials."

Easily offsetting any efficiency gains in the relatively few cases at the *top* of the federal litigation pyramid that might be

terminated slightly sooner under the "hypothetical record" approach are the enormous efficiency losses that would occur at the *bottom* of the pyramid. As noted in our opening brief, and as no one denies, if federal appellate courts are permitted to delete evidence from the trial record before deciding Rule 50(b) JAML motions, "parties will be forced to 'over try' their cases" out of a concern that some evidence might later be deleted on appeal. Pet. Br. at 25. For example, "[p]arties will be forced to present more than one expert on each issue because the appellate court might 'second guess' the expert's qualifications or opinions." *Id.*

Far from denying this point, respondents and their *amici* agree that under the "hypothetical record" theory they propose, litigants must put on at trial *all* the evidence they can possibly muster, or else risk "sudden death" on appeal if they put on sufficient evidence to win, but some of it turns out to be inadmissible. Focusing solely on the efficiencies involved in this case, they argue that at trial petitioner had an obligation to put on every piece of evidence available to him, even if the evidence would duplicate evidence already admitted that was sufficient to prove the case — a rule that, concededly, would serve to ensure that *this case* need only be tried once, as efficiently as possible. *See* Brunswick Br. at 23 (complaining that "petitioner *voluntarily* chose not to put on one of the experts disclosed in the pretrial order"); *id.* at 30 (litigants should "present their best evidence"); Respondents' Br. at 30 (a plaintiff should "try his best case").

But the issue with respect to an efficiency analysis is not whether a "hypothetical record" approach is justified to ensure that this case, or the handful of other like cases on appeal, will come to an end as quickly as possible. The issue is whether the resource savings on these few cases would be outweighed by the costs that would be imposed on litigants in *all* cases who will in the future collect evidence, conduct discovery, and produce witnesses for trial. If the approach of respondents and their *amici* is adopted, all future litigants will find it necessary to overprepare and overtry their cases simply to avoid the risk of

what will quickly become known as a "*Weisgram* reversal" — that is, a post-verdict loss caused by the failure to put on enough duplicative evidence to cover gaps not in the *actual* trial record, but in the truncated, *hypothetical* trial record to be created after the jury's verdict and before the decision on the JAML motion.

Most of these costs will be incurred across a broad range of cases at the base of the litigation pyramid, as cases are prepared for trial. Only a tiny fraction of civil cases are ever tried, and only a tiny fraction of cases that are tried and appealed would qualify on their facts for *Weisgram* reversals. Thus, it is readily apparent that the minor efficiencies that would be gained from each *Weisgram* reversal would come at the price of substantial inefficiencies imposed on litigants in hundreds of cases being prepared for trial.

This Court confronted a strikingly analogous situation several years ago, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 28 (1994), where it dismissed an efficiency argument similar to respondents' as "impossible to assess." In *Bonner Mall*, the Court rejected the view that had been taken in some circuits that federal courts should order routine vacatur of their decisions where the parties in a case pending on appeal desire to settle, but have conditioned their settlement on vacatur of the underlying decision. In a unanimous opinion for the Court, Justice Scalia noted that "while the availability of vacatur may facilitate settlement" on appeal in *the particular case at hand*, a rule allowing routine vacatur "may deter settlement at an earlier stage," as some litigants in the beginning stages of a case "may think it worthwhile to role the dice rather than settle . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal." *Id.* at 27-28.

We urge the Court in this case to carefully consider the enormous systemic costs that would likely be imposed at the district-court level, with regard to both trial preparation and

trials, if the appellate court rule advocated by respondents and their *amici* is adopted.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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