IN THE SUPREME COURT OF THE UNITED STATES

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DISTRICT OF COLUMBIA, ET AL., :

Petitioner :

v. : No. 99-1953

TRI COUNTY INDUSTRIES, INC. :

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Washington, D.C.

Wednesday, January 10, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

CHARLES S. REISCHEL, ESQ., Deputy Corporation Counsel, Washington, D.C.; on behalf of the Petitioner.

FRANK J. EMIG, ESQ., Greenbelt, Maryland; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 99-1953, The District of Columbia v. Tri County Industries.

Mr. Reischel.

ORAL ARGUMENT OF CHARLES S. REISCHEL

ON BEHALF OF THE PETITIONER

MR. REISCHEL: Mr. Chief Justice, and may it please the Court:

The principal issue here today is fundamental to the functioning of our civil jury system, but it is one which the courts of appeals have disagreed about for decades. That issue is whether a trial court which sets aside a jury verdict in a civil case as against the weight of the evidence is entitled to very substantial deference by an appellate court.

We submit that the trial court is entitled to such substantial deference. Indeed, we submit that the standard is whether any reasonable judge could have concluded that the verdict was against the weight of, the great weight of the evidence.

We submit that the D.C. Circuit below applied the strict scrutiny standard, which boils down in practice to whether there was sufficient evidence for the question

to go to the jury. We submit this was error. It's inconsistent with what a trial court does.

QUESTION: I thought that the court of appeals used the expression, a more searching inquiry than had the motion been denied. I didn't realize they used the term, strict scrutiny.

MR. REISCHEL: I'm sorry, more searching inquiry is the phrase that they do use.

QUESTION: And they use the term, more searching inquiry, as I understand it, to compare it with the sort of inquiry where the district court has denied the motion for a new trial?

MR. REISCHEL: Yes.

QUESTION: Certainly it's comparing it with something.

MR. REISCHEL: Yes, and there are also other distinctions about the sort of error that's involved, but yes.

QUESTION: Is it your position that it is exactly the same inquiry in the court of appeals whether a district court grants a motion for a new trial or denies it?

MR. REISCHEL: Yes, Your Honor, it is, and our position is, can any rational judge have made that decision.

QUESTION: It seems somehow counterintuitive, though I realize that doesn't make it wrong, that where a district -- where the trial judge is in effect giving effect to the jury's verdict, he shouldn't get a more lenient standard of review than when he disapproves it or sets it aside.

MR. REISCHEL: I don't think, on analysis, it is. This is ultimately rooted in the unique perspective a trial court has on the evidence. As Justice Black said in Cone v. West Virginia Pulp & Paper, when a trial court in ruling on a motion to set aside a trial, to order a new trial, he has a fresh perspective on the evidence, he has just seen it go in, he has also got a fresh perspective on the effect, the impact of the evidence on the jury --

QUESTION: But that's true whether he denies the motion or grants it.

MR. REISCHEL: That's true. It's true in either case, but the trial judge is there. The trial judge sees what happens, and for that reason the trial judge and the trial judge alone can actually engage in weighing the evidence.

QUESTION: Well, when you say what this is ultimately rooted in, I mean, whatever decision we come out with has to be ultimately rooted in the Seventh Amendment, I assume.

MR. REISCHEL: Yes, Your Honor.

QUESTION: And the Seventh Amendment certainly has quite different application when you're talking about a trial judge who has accepted the jury's verdict and, on the other hand, a trial judge who has rejected the jury verdict, in effect overridden it and said we have to have a new trial. I don't know why the same standard of review has to apply to both of those situations when the Seventh Amendment treats them differently.

MR. REISCHEL: Well, the -- there is one minor difference, and that is, the court has to look to whether the trial court applied the proper standard. That is, when he sets side a verdict that's contrary to the weight of the evidence, the question is, can a rational judge have made that decision? That is, was it clearly contrary to the weight of the evidence.

QUESTION: Sometimes the evidence would be evidence that juries have particular ability to evaluate, or at least the power is given to them saying witness demeanor. There could be other cases in which the matter is not particularly one that's suited to a jury.

I mean, it turns -- he gives a new trial because of something to do with a document and its admissibility or something like that. Would you at least say that where it's a matter that the juries are entrusted with the

decision, a trial judge should be particularly careful of granting a new trial contrary to the jury?

I mean, what I'm wondering at is -- what I'm wondering about is if it perhaps is the same standard, but in applying that same standard you should pay particular attention when you overturn a jury verdict because, judge, the jury has responsibilities to decide things that you don't have.

MR. REISCHEL: That's true, but the trial judge has a much better take on both the force of the evidence and the impact on the jury.

QUESTION: No, if that's true, would you be satisfied with that result? Suppose this Court said, well, in a sense it's the same standard, but what searching inquiry means is, it means, after all, here you are upholding the jury, not going against the jury, and if you were going against the jury there are many reasons why you should be very careful. Does that satisfy you?

MR. REISCHEL: I think that's implicit in the great weight of the evidence part of the test. The rational judge has to be able to say that this was against the great weight of the evidence.

QUESTION: Oh, well then are we arguing about anything other than just, which is often true in such cases, words?

MR. REISCHEL: I think the words have had real consequences in appellate review. I think if one looks to what the D.C. Circuit and other circuits following the Lindh decision actually do is, it boils down to was there evidence to support the jury verdict?

If there was, they say that it was an abuse of discretion to set it aside, but it's Hornbook law that a court can set aside a jury verdict even if there's substantial evidence to support it if the court makes an independent determination, without drawing inferences for the verdict, an independent determination that it's contrary to the great weight of the evidence.

QUESTION: Do you think that a jury verdict can be against the great weight of the evidence when the only thing that the judge disagrees with, the trial judge, is the jury's evaluation of credibility?

MR. REISCHEL: There are --

QUESTION: Can that possibly be against the great weight of the evidence?

MR. REISCHEL: There are a -- my answer is yes.

QUESTION: And if -- let me tell you why I asked the question --

MR. REISCHEL: My answer is yes it can be.

QUESTION: -- because if not -- if not, then the court of appeals is fully able to evaluate the issue as

effectively as the trial judge is.

MR. REISCHEL: There are, Justice Scalia, a range of different kinds of credibility determinations. One might be what someone might call eyeball credibility. You look at a person testifying, and are they lying, are they sweating, are they nervous, all of that.

The other kind of credibility finding is, is what they're -- does what they're saying make sense, and to the extent that there's a credibility determination involved here, the question went to the credibility of the financial expert because the financial expert, Dr. Morris, based his financial projections on data that wasn't rooted in, and was contrary to, what the industry expert, DiRenzo, said.

QUESTION: Well, that's queer -- that's a queer description of credibility. I mean, on that basis any facts that don't make sense are incredible. Yes, I suppose that's right, but I wouldn't consider that a credibility determination. I'd consider that a determination of whether there was substantial evidence on the record.

If there's something on the record that is utterly incoherent and makes no sense, that's not evidence. It's not adequate evidence, and a court of appeals can evaluate that.

I thought that when we're talking about credibility we're talking about the eyeballing the witnesses. I don't believe this fellow, he's shifty-eyed, or whatever.

MR. REISCHEL: If we're talking about what I would call eyeball credibility, the courts are -- the circuits are in disagreement as to whether the trial judge can reevaluate that independently. Some of them say no.

QUESTION: Mr. Reischel, I wasn't of the view that this turns -- this power relates only to the credibility of witnesses. I thought the judges exercised their determination to turn over a jury verdict based on maybe a whole range of things that occur at trial, including a judge might feel, I gave instructions that would pass muster with the court of appeals, so they're reversal-proof, but the jury didn't understand a damn word I was saying.

Or a judge might say, I excluded certain evidence that was favorable to the defendant. That, too, could survive appellate review, but on thinking it over I should have admitted the evidence and, either way, the court of appeals wouldn't touch me.

Those kinds of considerations don't go to credibility of witnesses.

MR. REISCHEL: That's true.

QUESTION: But it's a sense that the judge has that something went wrong at this trial.

MR. REISCHEL: That's true, and the judge here made two kinds of findings. One, he made a finding that he excluded evidence he should not have and disabled the jury in performing its function, and the most important evidence that he excluded was the October 15 invitation to be heard.

The harm here was that Tri County Industries said they were harmed because they hadn't been heard, but then they turn around and spurn an invitation to be heard, and the judge excluded that evidence, and he did so in part because of his ruling that all these issues had been resolved earlier, and then when he thought about it said, that wasn't -- that isn't right, and it probably confused the jury. But --

QUESTION: Those things -- my point maybe wasn't clear. I'm not saying that eyeball credibility is the only thing that the district judge can take into account. Of course he can take into account these other things, but these other things are evaluable by the court of appeals just as readily as they're evaluable by the trial judge. A court of appeals can say, well, this stuff was excluded. It could have been let in, and if it had been let in, then it would be different.

This instruction to the jury was confusing, you can tell that from the cold record, and if that's so, I don't know why you should give any special deference to the trial jury.

MR. REISCHEL: Well, the court of appeals can't see the witnesses, and it can't see the jury, and it can't tell what impact a particular witness might have on the jury.

The key witness here for purposes of future earnings was Dr. Morris, Dr. Morris who came on as a Ph.D. and said, I've read a ton of things and I'm an expert in this field, and I can do all these mathematical things, but when he was cross-examined said, yes, but I based all of my industry stuff on -- all my prices on the Apex report by DiRenzo, and what DiRenzo's report said was that prices were being driven down so that they barely covered costs.

QUESTION: Doesn't that go to the credibility of the expert, whether what he relies on is worthy of credence by the fact-finder?

MR. REISCHEL: It goes to the probative force, I think, of his testimony.

QUESTION: How much weight you should give the testimony, which I thought --

MR. REISCHEL: That's correct, and that --

QUESTION: -- is a form of credibility.

MR. REISCHEL: That's right, Justice O'Connor, and that's precisely what the trial court could weigh and what an appellate court cannot weigh.

QUESTION: Well, but that's precisely what the jury, the fact-finder must determine, and in this case it was a jury.

Do you think that the appellate standard for review is basically an abuse of discretion standard?

MR. REISCHEL: Yes, Your Honor. We think that follows from Gasperini. Gasperini says, if we read it correctly, that an appellate court can assess matters of fact only if there's no reasonable disagreement about the facts.

QUESTION: Okay. Well, if it is abuse of discretion there is still room within that standard, I suppose, to say that a jury fact-finder determination on credibility of witnesses is not to be disturbed by the trial judge, and if the trial judge does, it's an abuse of discretion.

MR. REISCHEL: But this wasn't simply eyeball credibility. This was, is what the expert is doing here, does it make sense? He's testifying about projected future profits where the underlying industry evidence, the only industry evidence produced also by Tri County, showed

that this heat remediation that they were getting into was a declining industry, and that the last --

QUESTION: Yes, but didn't the jury discount his testimony by about 50 percent anyway?

MR. REISCHEL: The jury discounted his testimony, but the jury still came up with a $4.64 million return --

QUESTION: And he said it should have been --

MR. REISCHEL: -- on a $9 million investment.

QUESTION: Well, I understand, but he said it should have been twice that amount, didn't he?

MR. REISCHEL: He said -- yes. He said, 150 percent return per year, or 125 percent return per year. The jury found 49 percent return per year for each of 7 years, in an industry where the segment of the industry was shrinking, and the last entrant who had tried to come in had found it necessary to gain market share to cut prices below cost and had failed.

QUESTION: I understand all that, but I thought it was fairly elementary damage law that if you prove the fact of damage, and I guess that was proved here, that -- and if there isn't a clear measure of damage out there, the jury's allowed quite a bit of leeway in figuring the amount of damage, and here they took half the expert's --

MR. REISCHEL: The question is whether or not

the damage assessment is a reasonable one.

QUESTION: Correct.

MR. REISCHEL: And where Tri County's own evidence is that the last person who entered failed, it's a shrinking industry, and that prices are being driven down just barely to cover costs, it's not reasonable to --

QUESTION: But you didn't take the position there was no damage.

MR. REISCHEL: No. There were --

QUESTION: You took the position the amount was exaggerated.

MR. REISCHEL: The judge didn't take that position, either. The judge took the position that a million dollars of damages, which would have been a 5-percent return on investment, was about right because there was a -- well, I assume because there was a differential for transportation costs, but to project 49-percent return each of 7 years in a declining industry where the last person failed is not a reasonable projection, and the judge said, this is pro forma. It has nothing to do with reality.

He said, at page JA-79, how do you explain this in light of the fact that prices are being driven down to costs? How do you explain, he said in his decision --

QUESTION: Well, how did the judge explain the

million dollars, other than that was just a further discount? He said, oh, it's a failing industry. I'll discount it more. It seems to me that's all he said.

MR. REISCHEL: I think what he was finding was, if one looks just at the industry testimony, that is DiRenzo's testimony, that there was a slight boost for this industry in D.C. because transportation costs were slightly better, so one could say that they might be entitled to make a modest return on investment. 5 percent per year is a modest return on investment. 49 percent per year for 7 years, I'd like to have that kind of --

QUESTION: Mr. Reischel --

QUESTION: What we've got here, Mr. Reischel, the question before us is the standard that the court of appeals should have applied, as opposed to, perhaps, what it did apply, not whether it was right or wrong in this particular case.

MR. REISCHEL: Right, but --

QUESTION: I was about to make the same suggestion, and the discussion we're having, it seems to me, demonstrates quite clearly that an appellate court can inquire into this matter just as effectively as the district court.

MR. REISCHEL: As I read --

QUESTION: You know, you're making points that

are there on the record, and reflected in the record material.

MR. REISCHEL: Well, as I read Gasperini, appellate courts are not allowed to weigh evidence. Trial courts are. Appellate courts aren't. Trial courts are allowed only to --

QUESTION: Mr. Reischel, I'd like to clear the air on Gasperini, because frankly I don't think it has anything to do with this case. I mean, Gasperini concerned New York's attempt to get a handle on excessive damages, and it did it -- instead of having a substantive cap it had a procedural way of doing it.

Gasperini said, New York gave it to a court of appeals. You can't do that in a Federal system because courts of appeals can't always see juries.

MR. REISCHEL: Weigh evidence.

QUESTION: The only one who can do it is the trial court judge, so Gasperini had to do with the control authority of a trial court judge. It didn't have anything to do with the perspective that the court of appeals was to take vis-a-vis the trial court judge, and it didn't say anything about the difference between, if there is any between grant or denial, so I did not understand Gasperini to address this question.

MR. REISCHEL: No, Gasperini doesn't talk about

the difference between grants and denials, but the linchpin of Gasperini as I read it, in terms of assessing facts, is, they're quoting Dagnello v. Long Island, whether there has been -- there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.

As I read Gasperini, what the Court was saying was -- and this was about excessive damages -- that trial courts can weigh things and examine things, but appellate courts must take the facts as given unless it's beyond the point where reasonable men can disagree.

Here, I don't think there's a question, and I think that drives us to the standard that we propose, which is whether a reasonable judge could have come to this conclusion. If a reasonable judge couldn't have, then there's room to disagree.

QUESTION: Well, there's a difference, too, when we're talking about --

MR. REISCHEL: There's no --

QUESTION: -- is the flaw the excessive damages, or is it some other thing that went wrong so that the wrong person won.

Here, I take it it's the former, because the judge said, remittitur, or if you won't take the

remittitur, a new trial, and I thought there was a legal standard to govern remittitur. That is, a trial judge is supposed to set it at the maximum amount that a reasonable jury could award on the basis of the evidence presented. Isn't that the standard?

MR. REISCHEL: That's correct. That's correct, and the judge thought, on the basis of the only competent market evidence there could have only been a very modest gain and not the sort of 49 percent per year gain that the jury awarded, much less the 124 percent per year gain that the financial expert projected.

But the court did say several different things. Two rulings, the rulings on mitigation, which was a ruling that if, as Tri County testified, that they thought they were going to be $2 million a year in profits -- $2 million a year in profits from this new entity that they were going to set up -- is it reasonable for them to do absolutely nothing?

They didn't respond to a letter inquiry about what their position was. They didn't pay a $50 fine, which said on its face if you don't pay this your license is going to be suspended. They didn't show up at a hearing, and they said --

QUESTION: Mr. Reischel, you're still arguing the merits of this particular ruling and what the court of

appeals did with it, rather than fitting it into a standard argument. I mean, I don't think we're going to decide here whether or not the court of appeals properly reversed the trial judge's decision. We're going to decide whether it applied the right standard.

MR. REISCHEL: Yes. I do that in part, Your Honor, to show what the circuit's test has boiled down to.

QUESTION: But can you say, as -- I thought that the only question that I saw was that the D.C. Circuit wrote one sentence that I thought was a throw-away line, frankly, where it said that there's a more searching inquiry when the judge grants a new trial motion than where he denies it.

Then I thought to myself naively, where he grants a motion, the court of appeals has to see if he invaded, say, the credibility province of the jury, and where he denies it they don't have to do that job, so obviously it has to be more searching, and that stopped right there.

All right, now, what's the response to that naive argument?

MR. REISCHEL: The response to that naive argument is, the D.C. Circuit's standard boils down to, if there's sufficient evidence to go to the jury, that's the end of the inquiry.

QUESTION: But why isn't that answer -- I have the same question that Justice Breyer does, and why isn't your answer, in effect, another answer of the sort, they got it wrong in applying their standard?

I mean, you're saying, you know, what they were really doing was something other than what the verbal formula suggested, and maybe that's so, and maybe they applied their verbal formula wrongly, but is the formula itself, is the statement of the standard wrong?

MR. REISCHEL: The standard as the D.C. Circuit has explicated it, particularly in the Taylor case, which respondent cites at page 26 of its brief, explains what the D.C. Circuit understands, and it says that when a trial court sets aside a jury verdict, the appellate court's normal allegiance to the trial court falls away, and its allegiance is to the jury, and that drives them to the point, which they did in this case, of saying, if there's enough evidence to go to the jury, that's the end of the inquiry.

QUESTION: All right. May I put my question in a different way? I think it's the same question that Justice Breyer has been asking. Here are two ways of looking at the problem, and after I've stated the two ways I'm going to ask you whether there is anything other than a verbal difference between them.

One way of looking at the problem of trying to derive a standard would be this way. There is only one standard for the appellate court to apply, and it's an abuse of discretion standard. When applying an abuse of discretion standard to a denial of a new trial, it's fairly easy, because we place great weight on the jury verdict itself. We place great respect on the jury verdict.

But when applying the abuse standard to a jury verdict -- I'm sorry, to an appellate -- to a trial court decision that grants a new trial, that vacates the verdict, we have to look very carefully at the facts and the record for the simple reason that we do have great respect for the jury verdict.

In each case, we're applying the same standard, abuse of discretion, but in the two cases we have to look to different kinds, or at least to different degrees of factual data. That's one way of looking at it.

Another way of looking at it is to say, when a trial court in effect denies a new trial, we say, well, abuse of discretion. That's all we look at. But when a trial court grants the new trial we engage in reviewing it in a more searching inquiry because, in fact, we have great respect for the jury verdict.

Is there any difference, except a verbal

difference, between those two ways of looking at what an appellate court does when it reviews a trial court's decision?

MR. REISCHEL: There has been a difference in application which has driven the appellate courts to ask only, was there sufficient evidence to --

QUESTION: Well, is your answer then that the way I put it there's nothing but a verbal difference, but the way the courts are applying it, they are importing something beyond a verbal difference in the way they are applying it?

MR. REISCHEL: They are imposing a more stringent standard. In a way the standard is more stringent anyhow, because the great weight of the evidence point is built into it when there's a reversal, and it's not built into it when there's a denial.

QUESTION: Well, what is your standard? If the standard is not, was there sufficient evidence to go to the jury, which I assume is the same as saying, could a reasonable jury, on the basis of this evidence, have found for the plaintiff, if that is not the test that the appellate court is supposed to use in deciding whether it was wrongful for the trial court to set aside the jury verdict, then what is the test?

Do you think the trial court can set aside the

jury verdict even when a reasonable jury on these facts could have found for the plaintiff in this amount?

MR. REISCHEL: Yes, Your Honor. That's Hornbook law, that when -- even though there's sufficient evidence to uphold a jury verdict, it can be set aside so long as the trial court thinks it's against the great weight of the evidence, and that goes back to Blackstone, whose test was, was the judge reasonably dissatisfied therewith.

Our --

QUESTION: The difference between insufficient evidence, which would be -- it used to be JNOV, but now it's -- judgment as a matter of law -- insufficient evidence is JNOV. New trial is something -- is more discretion.

MR. REISCHEL: Precisely, Your Honor. Courts of appeals are substituting the matter-of-law test for the new trial test, and that's exactly what --

QUESTION: Aren't you overlooking something rather important? It isn't only the weight of the evidence. Sometimes an error of law was committed on either refusing to admit evidence or erroneously admitting evidence.

MR. REISCHEL: And both kinds --

QUESTION: Yes.

MR. REISCHEL: -- Justice Stevens, were

committed here, but I do want to point out what the D.C. Circuit did. They seemed to agree with the statement on page A-7 of our petition. Tri County responds that it is improper now to assess the relative strength of the parties showings, and then they go on to say that it was error for the court to take it away from the jury.

This is a directed verdict standard. It's the wrong standard. It negates what the trial court is doing, and an appellate -- the standard should be whether a reasonable judge could have come to the conclusion that this was contrary to the great weight of the evidence, and we believe that was clearly so here for two reasons, one because it was clearly unreasonable for a company that was going to get $2 million a year to do nothing whatsoever to protect that investment and because the forecast evidence of financial gain was so out of line with the market evidence that Tri County produced.

QUESTION: Then you would be satisfied in this case for us simply to say there is a difference between the JNOV standard and the great weight of the evidence standard.

QUESTION: You can answer that yes or no and then sit down.

MR. REISCHEL: No, Your Honor.

QUESTION: Okay.

QUESTION: Thank you. Thank you, Mr. Reischel.

Mr. Emig.

ORAL ARGUMENT OF FRANK J. EMIG

ON BEHALF OF THE RESPONDENT

MR. EMIG: Mr. Chief Justice, and may it please the Court:

I find that the standard for granting a new trial was suggested in the Honda Motor v. Oberg case, where, in situations involving excessiveness of a jury verdict, or a verdict against the clear weight of the evidence, could a national trier of the fact have reached the same conclusions as the jury?

If a rational trier of the fact could come to that conclusion, then those traditional common law grounds for granting a common law trial simply do not exist.

QUESTION: But if a rational trier of fact could not have reached that conclusion, it isn't setting aside a jury verdict JMOL. I mean, if a rational jury could not reach a verdict in favor of the plaintiff, it seems to me the case never should have gone to the jury in the first place.

MR. EMIG: That's correct. It's probably a Rule 50 disposition at that point.

QUESTION: So you say there's no difference between JNOV and setting aside a jury verdict that's

contrary to the great weight of the evidence. I mean, that's revolutionary, I think.

MR. EMIG: No, I don't think I'm going to that extent, Your Honor. I think, though, that in situations in which there is a verdict against the clear weight of the evidence or excessive damage, you have an element of sympathy or prejudice that is injected in the jury verdict which makes it not tied to the specific facts of the case, and for that reason the trial judge has some discretion and of course can grant a new --

QUESTION: But by hypothesis there a rational jury could reach a verdict in favor of the party whom it did, but there are other considerations brought to bear. You have great weight of the evidence, you know, improper admission, things like that, that permit the grant of a new trial where it would not have permitted the grant of a motion for judgment notwithstanding the verdict.

MR. EMIG: There are situations in which a new trial can be granted, you're correct, that deal with improper instructions, improper admissions of evidence, I would agree with that, but to the extent of a verdict being against the clear weight of the evidence, if a rational trier of fact could come to the same conclusion as that jury, then I don't think it should be set aside by a trial judge.

QUESTION: Okay, but you also accept the distinction that there is a distinction between whether an issue of damages can go to the jury, i.e., is there enough evidence to get it to the jury, and on the other hand the question whether the jury's verdict of damages should be set aside as against the great weight of the evidence because it's excessive.

MR. EMIG: Yes --

QUESTION: Yes.

MR. EMIG: -- I do see a distinction.

QUESTION: Okay, well, if you do accept that distinction, then what is your criterion for whether it ever gets to the jury or not? I assume it is something different, as you've just said, from the criterion of whether, after the jury verdict, the judge can declare a new trial.

MR. EMIG: I think it --

QUESTION: And I assume it is not, therefore, whether a rational jury, on the basis of this evidence, could reach that result, which is your standard for a new trial. So what is your standard for JNOV, then?

MR. EMIG: Well, certainly the JNOV is phrased in the light most favorable to the party that is seeking, or that the judgment is being sought against.

QUESTION: Yes, but isn't the --

QUESTION: That's the distinction, that for JNOV you do not have to view all the evidence in the light most favorable to the plaintiff, that -- I'm sorry, for a new trial you don't have to regard all the evidence in the light most favorable to the plaintiff. You're allowed to sit back and evaluate it impartially.

MR. EMIG: I think that --

QUESTION: That would be a distinction.

MR. EMIG: That would be, and I think the rules under Rule 50 do talk in terms of phrasing it, or phrase it more in terms of in a light more favorable to the plaintiff, or to the --

QUESTION: What we've got here, Mr. -- some fundamentals first, and that is, a refusal of the trial judge to let the case go to the jury on the directed verdict against the plaintiff and a judgement as a matter of law, or call it that, or granting a motion for a judgment as a matter of law after the jury returns a verdict is the rational basis standard. That is, no rational jury could have reached the verdict that this jury did, and that is not involved here, I take it.

What we're talking about is the grant of a new trial by the trial judge, and by hypothesis, a rational jury could have reached a verdict but still have it set aside because it's against the great weight of the

evidence, and the standard now we're talking, we want to find out, when the trial judge grants a motion for a new trial that way, what standard should the court of appeals apply?

MR. EMIG: Well, I think the court has to decide whether there is a conflict in the evidence. Could a jury reasonably have reached the conclusion, based upon the evidence, that it did, and unless -- I would point out this, also --

QUESTION: But you're just -- when you start talking about, could a reasonable jury have reached the result, you're back to the judgment NOV, or judgment MOL as they call it now, rather than weight of the evidence.

MR. EMIG: I think that's the only way I can explain how a trial judge should look at the evidence in terms of whether or not a new trial should be granted. I would suggest it's certainly not the standard that the District of Columbia suggests, that a trial judge has unlimited discretion to grant a new trial as long as his view of the evidence is reasonable.

QUESTION: Well, what is -- what should be the standard?

MR. EMIG: I think it should be the standard that was referred to in the Honda v. Oberg case, a -- could a rational trier of fact reach the same conclusion

as the jury.

QUESTION: What does Wright and Miller say? I mean, this is a subject -- I can only remember -- it was in my first year of law school, and all I remember from that is, they said, it's certainly different. I might not even remember that right.

(Laughter.)

QUESTION: I thought it was absolutely different, and everything's changed since then anyway, so what do Wright and Miller and the people who write about this say is the standard for giving a new trial, as opposed to a standard for giving a directed verdict?

MR. EMIG: Well, I don't see them distinguishing them. I think that a number of the circuit court of appeals cases talk in terms of whether, on great weight of the evidence --

QUESTION: They use the words, great weight of the evidence? What does Wright and Miller say? What do the writers -- this is a rather basic question, I think, that must be -- I can go look it up myself, but -- I will, too, but --

(Laughter.)

MR. EMIG: There's certainly some discretion, Your Honor, but at the same time, at no point in this opinion from the district court does it ever say that this

jury verdict is being set aside because it was against the great weight of the evidence. That is a term that is foreign to this district court opinion, and the only grounds that is asserted by the district court judge is excessiveness on one point of view. He does not rely on the traditional, this is against the great weight of the evidence.

QUESTION: Mr. Emig, well, that's perfectly appropriate. That's what the whole remittitur thing is about. If the judge thinks that the verdict is excessive the judge can say, plaintiff, you either take a reduction or I'm going to order a new trial, and that is quite distinct from, was there sufficient evidence to go to the jury.

MR. EMIG: That's correct, except in this particular situation we know that it was not an excessive -- we knew that from the evidence that was presented of approximately $12 million that a rational trier of the fact could have brought back a verdict anywhere up to that amount.

QUESTION: But you're going back again to the sufficiency, and Rule 50 would never, if these two standards were so close, put the -- put on the district court the very difficult chore of having to say, now, if I reject the judgment as a matter of law, I have to rule

alternatively, or if I grant the motion for judgment as a matter of law I have to rule alternatively on the new trial motion, so that making a district judge do that would be cruel and unusual punishment if these weren't discrete inquiries.

MR. EMIG: Well, except that a trial judge must be limited, I think, by the evidence to some extent when he rules on whether or not a verdict is excessive, otherwise he can call whatever verdict he wants and term it excessive, thereby nullifying a valid jury. There has to be some basis other than the judge's characterization of --

QUESTION: Did this trial judge decide that he'd made an error in excluding evidence at trial, and therefore wanted to correct that error somehow?

MR. EMIG: He did, Your Honor, but the problem of that analysis was there was no proffer by the District of Columbia to show how the health and safety of this project could ever result in a revocation of the permit. The District of Columbia came into this trial with the expectation --

QUESTION: But at least the trial judge's ruling may have been based on his notion that he'd made a mistake by excluding certain evidence that the defendants offered.

MR. EMIG: That's correct, except that that

conclusion was not supported by the evidence.

QUESTION: Okay, well, you've shown us why you think the trial judge's ruling was improper. We're not the court of appeals. What standard should the court of appeals have decided when it heard your argument?

MR. EMIG: Well, I think it should have applied an abuse of discretion standard. The problem that I have with this entire more searching inquiry, Your Honor, is, the D.C. Circuit has been using it for 30 years, and at no point in that course of time did they ever say, we are applying it, that's changing the standard of review to a strict abuse of discretion.

QUESTION: Well, certainly the term, more searching inquiry, suggests they're going to be a little more demanding, or more willing to reverse the grant of a new trial than they will the denial of a new trial.

MR. EMIG: That's correct.

QUESTION: And is there anything wrong with that point of view?

MR. EMIG: Well, I don't see any --

QUESTION: It would help you here.

MR. EMIG: I'm not sure it changed the standard of review. The --

QUESTION: Well --

MR. EMIG: The review was still abuse of

discretion.

QUESTION: Yes, well, but as pointed out by some of my colleagues abuse of discretion, but being more willing to reverse the grant of a new trial under some circumstances than the denial of a new trial.

MR. EMIG: I don't think they actually say they're more willing to reverse --

QUESTION: Well, but then, certainly, what does a more searching inquiry mean, then?

MR. EMIG: Well, I think it's a simple recognition that we're dealing with a jury reaching a certain determination and the judge disagreeing and granting a new trial.

QUESTION: That is to way, there are just more things in the record to review?

MR. EMIG: I think it's just an indication they're being a little more careful, Your Honor. I don't --

QUESTION: Do you --

MR. EMIG: I don't think it really substantively changed the analysis of the case. They said on three occasions they reviewed for abuse of discretion, nothing more, and if they intended more searching inquiry to mean stricter abuse of discretion, they would have said it, but they never --

QUESTION: Why do you think they said, more searching inquiry, then?

MR. EMIG: Well, because I think --

QUESTION: What does more searching inquiry mean?

MR. EMIG: They don't define that, and --

QUESTION: But it -- you can always go to a dictionary and figure out for yourself what it means.

MR. EMIG: I understand. It certainly means, at the very least, a more close look at the evidence, but --

QUESTION: Okay. Let's take a more close look, rather than more searching inquiry. Both a pretty much the same thing, and it means a greater willingness to reverse in the case of grant of a new trial than denial of a new trial.

MR. EMIG: No, I disagree with that. I think you're making a jump in terms of an outcome that is suggested by that standard that is not accurate. I think it just -- it says we're going to look at it. We're not favoring the plaintiff. We're not looking at favoring the defendant. We're just going to look at what happened more closely.

QUESTION: Well, you don't have to favor a plaintiff or a defendant in that sort of an equation. You favor the person who got the jury verdict.

MR. EMIG: Well, I don't think it favors either the jury verdict or the district court, which --

QUESTION: Well, sure it does. If you're going to conduct a more -- look, if the plaintiff had the judgment, any inquiry regarding the setting aside of that judgment which is going to be more searching is going to make it more likely that that setting aside will be held to be improper, so it will inevitably favor the plaintiff whose jury verdict has been set aside.

MR. EMIG: Or a defendant. I mean, it's not always the plaintiff.

QUESTION: Yes, okay, whichever. In the case of a remittitur it's always going to be the plaintiff, but --

QUESTION: Yes, but it's still true that even though it's more searching than the converse, it still has to be an abuse of discretion, and an abuse of discretion standard itself tends to protect the trial judge from reversal.

MR. EMIG: An abuse of discretion is a deferential standard, I would agree, but at the same time --

QUESTION: Do you support the court of appeals decision or do you not? I can't tell from what you say.

MR. EMIG: Oh, I do, Your Honor.

QUESTION: I thought you won, and I thought you

were here saying yes, they got it right.

MR. EMIG: I --

QUESTION: But you're not saying that, apparently.

MR. EMIG: No, I am.

QUESTION: I simply do not understand your argument.

MR. EMIG: I am saying that they did --

QUESTION: Did they get it right?

MR. EMIG: They got it right.

QUESTION: And they said they applied a more searching inquiry, was that right?

MR. EMIG: Yes, that's correct.

QUESTION: So they did do that, and that's okay?

MR. EMIG: That's okay.

QUESTION: All right.

MR. EMIG: But my other point, too is, just looking under, if this verbal formulation was omitted from the opinion it would still be the correct result. It was still an abuse of discretion by the trial court.

QUESTION: But if the court of appeals had not applied that standard, maybe it would not have been in your view the correct result. Maybe they would have affirmed the trial court.

MR. EMIG: Well, I think --

QUESTION: You're saying that you don't mind if we remand this for determination of the abuse of discretion standard. It doesn't make any difference.

MR. EMIG: I think it's already been reviewed under an abuse of discretion standard, but I would secondly say that this Court affirms judgments, not opinions, and that even if this Court were to find that a stricter abuse of discretion standard was applied, the result is still the same. The district court abused its discretion.

QUESTION: Then we shouldn't dismiss the writ as improvidently granted.

QUESTION: You'd be happy with that, right?

MR. EMIG: Yes, Your Honor.

QUESTION: Nothing turns on it. But there is one feature of this, we go back for the Seventh Amendment to how things were at common law, and at common law, as I understand it, the appellate bench had no role at all in any of this, that it was the trial court, it could be the poll court at Westminster, but here it's kind of an irony that the appellate court that shouldn't have been in it at all is exercising muscle vis-a-vis the trial court that at common law had the only word on whether there be a new trial.

MR. EMIG: Well, I don't think that this is

completely out of the range of appellate review. If --

QUESTION: But why, if you were adhering to the model at the time that the Nation was formed, why wouldn't you say the appellate court, whatever roles there are in this, yours has got to be minimal, because you didn't even have a say at common law.

MR. EMIG: Well, I think you had a say to the extent if an error of law was committed that could always be appealed, but at the same time, the modern courts have allowed if the judge makes an error to have that decision set aside and a new trial, or the original jury verdict reinstated.

QUESTION: But the discretion on setting aside a verdict as against the weight of the evidence was entirely, as I understand it, in the hands of the trial bench. Just, not any errors of law made, no errors in the charge, no errors, no reversible errors in the admission of evidence, but against the weight of the evidence was trial court business and not appellate business.

MR. EMIG: Well, I guess that depends on whether the en banc court was looked on as operating in an appellate capacity in reviewing the facts.

QUESTION: Well, Mr. Emig, you didn't give us any assistance by discussing that common law in your brief, but I have scratched around and I think there was

a -- you know, I dissented in Gasperini because I thought that there was no review at common law, but what the situation as I understand it was, was that there was no review when the district judge, when the trial judge refused to set aside the trial, but that there was review in the situation we have here, when the trial judge did set aside.

There are several cases in which the appellate court looked into whether that was proper or not, so I'm -- you know, I'm -- now, where does that leave me? If I thought we were wrong in Gasperini, and there were several on this who joined me, in allowing appellate review at all -- we allowed appellate review there on the basis of abuse of discretion. I guess to be consistent we should have an even stricter standard when there's review in the situation where the jury verdict is ignored, so I guess there should be something beyond abuse of discretion, or should -- I don't know.

MR. EMIG: Well, I -- my position in this, Your Honor, is that it was not set aside, the jury verdict, because it was against the great weight of the evidence, that there was no evidence in this case of damages.

QUESTION: You want to reargue your case. Now, why did you take it as an assumption that if you lose on this issue it's going to go right back to the D.C.

Circuit, if you lose on the issue which is in front of us, which is not the issue that either of you apparently wants to argue, and that's the issue about whether -- it says, did Gasperini make unlawful the throw-away line that the D.C. Circuit threw in.

Now, maybe we shouldn't be hearing that, but we're hearing it, so my question concerns that, and I've looked at Wright and Miller, and as I look at their standards for new trial it strikes me that I understand very well your uncertainties, because what it says is, there are all kinds of verbal formulations all over the place, and you say the D.C. Circuit has adjusted to this over 30 years, and I expect other circuits have adjusted over similar periods of time to different verbal formulations, and if we start fooling around with those in this case, there is no matter so close to the heart of the trial bar, and suddenly we will discover different circuits doing different things in light of what we say.

So if we say you're right on these words, searching inquiry, some other circuit is going to take that as a signal that they're wrong and, therefore, if we allow the D.C. Circuit to do what it did for 30 years, some other circuit will be unable to do what it has done for 30 years, so what do we do?

MR. EMIG: I think the one thing that can be

done is simply to look at the opinion itself from the district court granting the new trial and, if you feel only an abuse of discretion standard is applicable and should not be applied more strictly, does that opinion, in and of itself, constitute an abuse of discretion.

QUESTION: You want me to go back and look at the facts here in your case, which I do not intend to do, so ruling that out, what do I do?

MR. EMIG: Then I think in that situation my position is, it's entirely unclear in terms of what they meant and how it was applied.

QUESTION: But I thought one of your arguments in answer to the petitioner was, petitioner, you knew all along that the D.C. Circuit is applying a stricter standard when it's reviewing grants than when it reviews denial. You knew it, and you didn't tell the D.C. Circuit when you were before that court, so it's too late. If you knew that they were going to apply a stricter standard to grants than denials, you should have told them, D.C. Circuit, don't do what you're doing for 30 years. You didn't tell them that, so you effectively forfeited the point.

You made that argument in your brief to us.

MR. EMIG: I did.

QUESTION: So you must think that this was a

standard that had some bite to it.

MR. EMIG: I think when we included it in our brief we were simply asking the Court to pay close attention to the facts of the case.

If D.C. thought that that entailed a stricter abuse of discretion review, that should have been brought up at that point and it could have been resolved one way or the other by the court of appeals, but they had their opportunity and all of a sudden it becomes a problem now, when the decision comes, and there's this verbal formulation of a more searching inquiry.

But the fact of the matter is, the D.C. Circuit only says, abuse of discretion, and I think that under those circumstances that was the correct standard to apply, and that they were certainly entitled to review the record more carefully because a jury verdict had been set aside.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Emig.

MR. EMIG: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)