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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. :
- - - - -X

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.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

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

6 Mr. Reischel.

7 ORAL ARGUMENT OF CHARLES S. REISCHEL

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

13 MR. REISCHEL: Yes.

14 QUESTION: Certainly it's comparing it with
15 something.

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

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

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

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

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

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

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

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

1 MR. REISCHEL: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. REISCHEL: There are --

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

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

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

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

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

1 effectively as the trial judge is.

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

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

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

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

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

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

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

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

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

25 MR. REISCHEL: That's true.

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

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

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

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

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

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

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

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

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

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

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

1 QUESTION: -- is a form of credibility.

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

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

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

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

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

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

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

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

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

8 QUESTION: And he said it should have been --

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

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

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

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

25 MR. REISCHEL: The question is whether or not

1 the damage assessment is a reasonable one.

2 QUESTION: Correct.

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

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

9 MR. REISCHEL: No. There were --

10 QUESTION: You took the position the amount was
11 exaggerated.

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

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

25 QUESTION: Well, how did the judge explain the

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

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

12 QUESTION: Mr. Reischel --

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

18 MR. REISCHEL: Right, but --

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

24 MR. REISCHEL: As I read --

25 QUESTION: You know, you're making points that

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

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

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

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

16 MR. REISCHEL: Weigh evidence.

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

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

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

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

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

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

20 MR. REISCHEL: There's no --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Is there any difference, except a verbal

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

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

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

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

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

25 Do you think the trial court can set aside the

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

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

9 Our --

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

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

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

23 MR. REISCHEL: And both kinds --

24 QUESTION: Yes.

25 MR. REISCHEL: -- Justice Stevens, were

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

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

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

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

24 MR. REISCHEL: No, Your Honor.

25 QUESTION: Okay.

1 QUESTION: Thank you. Thank you, Mr. Reischel.
2 Mr. Emig.

3 ORAL ARGUMENT OF FRANK J. EMIG
4 ON BEHALF OF THE RESPONDENT

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

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

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

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

22 MR. EMIG: That's correct. It's probably a Rule
23 50 disposition at that point.

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

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

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

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

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

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

8 MR. EMIG: Yes --

9 QUESTION: Yes.

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

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

17 MR. EMIG: I think it --

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

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

25 QUESTION: Yes, but isn't the --

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

7 MR. EMIG: I think that --

8 QUESTION: That would be a distinction.

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

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

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

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

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

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

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

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

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

1 as the jury.

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

7 (Laughter.)

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

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

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

22 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

1 conclusion was not supported by the evidence.

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

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

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

17 MR. EMIG: That's correct.

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

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

21 QUESTION: It would help you here.

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

24 QUESTION: Well --

25 MR. EMIG: The review was still abuse of

1 discretion.

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

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

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

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

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

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

19 QUESTION: Do you --

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

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

3 MR. EMIG: Well, because I think --

4 QUESTION: What does more searching inquiry
5 mean?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: I thought you won, and I thought you

1 were here saying yes, they got it right.

2 MR. EMIG: I --

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

5 MR. EMIG: No, I am.

6 QUESTION: I simply do not understand your
7 argument.

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

9 QUESTION: Did they get it right?

10 MR. EMIG: They got it right.

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

13 MR. EMIG: Yes, that's correct.

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

15 MR. EMIG: That's okay.

16 QUESTION: All right.

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

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

25 MR. EMIG: Well, I think --

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

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

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

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

14 MR. EMIG: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 You made that argument in your brief to us.

24 MR. EMIG: I did.

25 QUESTION: So you must think that this was a

1 standard that had some bite to it.

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

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

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

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Emig.

19 MR. EMIG: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 11:02 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25