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Albert D. Brault
Brault Graham, LLC

John A. Lynch Jr.
University of Baltimore School of Law, jlynch@ubalt.edu

THE MOTION FOR NEW TRIAL AND ITS CONSTITUTIONAL TENSION

Albert D. Brault†
John A. Lynch, Jr.††

> Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain.[1]

I. INTRODUCTION

The right to trial by jury in a civil case is one of the most revered incidents of American law. The right as embodied in the Seventh Amendment to the United States Constitution[2] was long ago described by the Supreme Court, per Justice Story, as "justly dear to the American people" and "an object of deep interest and solicitude."[3] The right to civil jury trial is provided in the constitution of nearly every state,[4] including Maryland.[5] The court of appeals has

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† B.S., 1955, J.D., 1958, Georgetown University. Partner; Brault, Graham, Scott & Brault.

†† B.A., 1971, St. Anselm's College; J.D., 1974, LL.M., 1978, George Washington University. Professor of Law, University of Baltimore School of Law.

1. Galloway v. United States, 319 U.S. 372, 407 (Black, J., dissenting).
2. The Seventh Amendment provides:
   > In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

   U.S. CONST. amend. VII.
3. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830). The importance of the civil jury to the American people was more recently underscored by then Justice Rehnquist:
   > It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.

   Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).
4. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 11.1, at 473 (2d ed. 1993).
5. *See* MD. CONST., DECL. OF RIGHTS art. 23. The Maryland civil jury provision pro-

echoed Justice Story's endorsement of the civil jury trial.[6]

Yet, the process by which a group of persons untrained in the law are brought to the threshold of their duty—an impartial, reasonable decision based on the law—is fraught with the possibility of mistake or mischief.[7] Some sort of a corrective device was required.

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vides: "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved." *Id.* This provision, described by Professor Charles A. Rees as the "principal provision," was originally adopted in Maryland's 1851 Constitution. *See* Charles A. Rees, *Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301, 314 (1997). The civil jury trial provision of Maryland's original 1776 Constitution, described by Professor Rees as the "reception provision," survives as Article Five of the Maryland Declaration of Rights. *See id.* at 312. This Article provides:

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

MD. CONST., DECL. OF RIGHTS art. 5. The purpose of adopting the principal provision in Maryland's 1851 Constitution was "to safeguard the jury right from legislative change or repeal." Rees, *supra*, at 315.

6. *See* Allender v. Ghingher, 170 Md. 156, 167, 183 A. 610, 616 (1936) (citing *Parsons*, 28 U.S. (3 Pet.) at 446).

7. Blackstone described these possibilities as they existed in his time:

> Either party may be surprised by a piece of evidence which, had he known of its production, he could have explained or answered; or he may be puzzled by a legal doubt which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion *instanter*, that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best-intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse.

3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 391 (William D. Lewis ed., 1922).

In the darkest mists of common law practice, this device was the attaint, which involved prosecuting the errant jurors for perjury before a new jury of twenty-four individuals.[8] For obvious reasons, this fell into disuse at an early stage in the development of the common law.[9] The precursor of the modern appeal, the writ of error, was unduly cumbersome.[10]

The new trial, *venire facias de novo*, developed into the principal method of correcting errors at trial in English common law practice.[11] This remedy was used as early as the fourteenth century with respect to cases of jury misconduct[12] and involving excessive damages.[13] The utility and desirability of this device was recognized early; as opined by Lord Mansfield in *Bright v. Eynon*,[14] "[t]rials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials."[15] The practice, however, was not as common on the other side of the Atlantic, at least in colonial times and shortly thereafter.[16]

Although the right to jury trial in England was central to its trial system,[17] there does not seem to be any indication in the schol-

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8. *See id.* at 402-05 (explaining the writ of attaint).
9. *Id.* at 390. The new jury's determination was not whether the original jury believed the verdict they delivered, but whether the verdict was actually correct. *See* WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 341 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956). Jurors who had not made the "correct" determination were sentenced. *See id.* The sentence was uniformly applied to all convicted jurors–one year imprisonment, forfeiture of goods, infamy, lands laid to waste, and wives and children were forced to be turned out. *See id.* The severity of this device and the increasing judicial character of juries caused it to fall into disuse at an early stage in the development of the common law. *See* BLACKSTONE, *supra* note 7, at 390.
10. *See* HOLDSWORTH, *supra* note 9, at 223-24. Almost any error on the record was ground for a writ. *See id.* at 223. In order for the writ to be granted, there must have been an error that was included in the record. *See id.* at 215. However, the record generally only included the arraignment, plea, issue, and verdict—not the most material parts of the trial such as the evidence or jury instructions. *See id.* at 215-16. If parties alleged an error in the trial court's decision or any other matter not included in the record, this device was ineffective, even if the error was material and erroneous. *See id.* at 223.
11. *See* William R. Riddell, *New Trial at the Common Law*, 26 YALE L.J. 49, 54 (1916).
12. *See id.*
13. *See id.* at 55.
14. 97 Eng. Rep. 365 (K.B. 1757).
15. *Id.* at 366.
16. *See* Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 515 (1996).
17. *See* Rees, *supra* note 5, at 321. However, because acts of the English Parliament

arly commentary that the development of a motion for new trial interfered with the prerogatives of the jury as the fact-finder. Indeed, Blackstone implied that a new trial enhanced the right to trial by jury:

> A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.[18]

The notion that granting a new trial does not impair the right to trial by jury because it simply results in another jury trial has been echoed in the United States.[19]

The civil jury trial provisions of the Maryland Constitution[20] and the Seventh Amendment to the United States Constitution preserve the jury trial right as it existed in England in the late eighteenth century.[21] The right to a trial by jury in England was subject

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are not limited by a written constitution, the right to a civil jury trial has been limited to certain situations, such as fraud, defamation, malicious prosecution, and false imprisonment. *See id.; see also* RICHARD M. JACKSON, JACKSON'S MACHINERY OF JUSTICE 391 (J.R. Spencer ed., 8th ed. 1989) (noting the importance of the right to trial by jury under English law).

18. 3 BLACKSTONE, *supra* note 7, at 391. This notion that a second trial will produce a better result also seems supported by William Tidd who described ordering a new trial as "no more than having the cause more deliberately considered by another jury." 2 WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 904 (Asa I. Fish et al., eds., 4th ed. 1856).

19. *See, e.g.*, Marsh v. Illinois Cent. R.R. Co., 175 F.2d 498, 500 (5th Cir. 1949) ("[A motion for a new trial] never supercedes the jury but, as the name states, it results in another jury trial."). In *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), the Supreme Court stated that following the setting aside of a verdict by the court, the Seventh Amendment required a new trial "with the same right to a jury as before." *Id.* at 380.

20. *See* MD. CONST., DECL. OF RIGHTS arts. 5, 23; *see also* Knee v. Baltimore City Passenger Ry. Co., 87 Md. 623, 624, 40 A. 890, 891 (1898) (discussing the civil jury trial provisions of the Maryland Constitution).

21. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974) (stating that the purpose of the

to the power of the trial court to grant a new trial.[22] Thus, the existence of such a discretionary power in the federal and state trial courts today should imply no threat whatsoever to the jury trial.

Such reasoning, however, glosses too easily over important questions relating to advancements in the law of procedure and the scope of jury trials at both the state and federal levels.[23] Both federal and state courts must determine whether jury trial provisions preserve specific procedural trappings involved in jury trials conducted over two centuries ago[24] or whether they simply preserve the "substance" of a civil jury trial, allowing for substantial evolution of the procedural context in which the right is exercised. In essence, the ultimate question is whether it is necessary to expand the right to trial by jury to preserve it. Such questions concerning the protection required for jury trial have been addressed in the last generation in the federal system[25] and in Maryland[26] in the wake of the merger of law and equity.[27] In that context, both the Supreme Court and the Maryland Court of Appeals adopted approaches that strongly protect, perhaps even expand, the right to trial by jury in civil cases. To the extent such an approach allows or effects an expansion of the jury trial right or removes control of such right that once existed, it might be called a dynamic approach.

The Maryland appellate courts have not recently assessed the effect of a trial court's exercise of the time-honored power to grant a new trial on the right to trial by jury. Two things indicate that the time may be right for such an assessment. They are, first, the analy-

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Seventh Amendment was to preserve the right to jury trial).

22. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 7.24, at 382 (Little, Brown & Co. 4th ed. 1992).

23. For a discussion of the modern procedural devices available to Maryland trial courts, see *infra* notes 43-46 and accompanying text.

24. *See* Rees, *supra* note 5, at 305 (discussing the attempt to pickle, not preserve, the jury trial right).

25. *See generally* Beacon Theatres v. Westover, 359 U.S. 500, 501 (1959) (discussing the importance of scrutinizing with utmost care any curtailment of the right to a jury trial).

26. *See generally* Higgins v. Barnes, 310 Md. 532, 541, 520 A.2d 724, 728 (1987) (discussing the impact of the merger of law and equity on the availability of trial by jury).

27. This was accomplished through the adoption of Federal Rule of Civil Procedure 2 and Maryland Rule of Civil Procedure 2-301. Both rules provide that there will be one form of action known as the civil action. *See* FED. R. CIV. P. 2; MD. R. CIV. P. 2-301.

sis of the right to civil jury trial in Maryland in *Higgins v. Barnes*[28] and, second, the development of a growing body of authority in the lower federal courts and some states that a constitutional right to jury trial is not always adequately served by a new jury trial in cases in which a trial court sets aside a jury verdict.

This Article explores whether constitutional weight should be accorded to a jury verdict *vis-a-vis* the traditional power of the trial judge to grant a new trial. Part II of this Article explores the development of the judicial power to grant a new trial at common law and in modern Maryland practice.[29] Part III examines the right to jury trial in Maryland and the effect that the federal approach in *Beacon Theatres v. Westover*[30] should have on Maryland courts in defining the scope of the jury trial right.[31] In Part IV, this Article considers the emerging authority in the lower federal and state courts that increasingly limits a trial judge's discretion to grant a new trial.[32] Part V considers whether, in deference to the right to trial by jury, Maryland courts should adopt guidelines to restrict the discretion of trial judges to grant a new trial in order to foster judicial awareness of the constitutional tension between that power and the right to trial by jury.[33] This Article concludes that the imposition of a modest check on the discretion of trial judges in granting new trials would harmonize both the historical boundaries of the right to trial by jury and the advent of contemporary procedural frameworks.[34]

II. NEW TRIAL PRACTICE IN MARYLAND

The motion for new trial in Maryland is governed by Maryland Rule 2-533. Under Rule 2-533(a), a party may move for new trial within ten days after entry of judgment.[35] Rule 2-533(b) requires a party to state in writing the grounds advanced in support of a new trial,[36] but the rule, unlike those of some other states,[37] does not

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28. 310 Md. 532, 540-51, 530 A.2d 724, 727-33 (1987) (discussing Maryland's abolition of the separation between law and equity and its application to the right of trial by jury).
29. *See infra* notes 35-391 and accompanying text.
30. 359 U.S. 500 (1959).
31. *See infra* notes 392-701 and accompanying text.
32. *See infra* notes 702-865 and accompanying text.
33. *See infra* notes 866-882 and accompanying text.
34. *See infra* notes 883-889 and accompanying text.
35. *See* MD. R. CIV. P. 2-533(a).
36. *See id.* 2-533(b).
37. *See, e.g.*, UTAH R. CIV. P. 59(a). This rule establishes the following grounds for

enumerate possible grounds on which a party may seek a new trial.[38] Nonetheless, there is a catalogue of recognized bases for the grant of a new trial in Maryland.[39] That catalogue is similar to the bases for a new trial that prevailed in eighteenth century England.[40] Judicial error during the trial pertaining to evidence or instructions to the jury, prejudicial occurrences, juror misconduct, newly discovered evidence, and a verdict against the weight of the evidence were all bases for new trials in England.[41] Likewise, a jurisprudence has developed around each of these grounds for new trial under Maryland law.[42] Procedurally, a court's grant of a new trial may take several different forms. Under Rule 2-533(c), the trial court may set aside all or part of a judgment, grant a new trial as to all or any of the parties, or grant this motion on all or some of the issues if they are fairly severable.[43] The grant of a new trial as to all issues and parties is an interlocutory order and therefore not immediately appealable.[44] Rule 2-533(c) also permits a trial court to direct entry of

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a trial court's grant of a new trial:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
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> (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.
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> (3) Accident or surprise, which ordinary prudence could not have guarded against.
>
> (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
>
> (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
>
> (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
>
> (7) Error in law.

Id.

38. *See* MD. R. CIV. P. 2-533(b).
39. *See infra* Part II and accompanying text.
40. *Compare* JAMES ET AL., *supra* note 22, § 7.24, at 382 (discussing the grounds under English common law), *with infra* notes 60-391 and accompanying text.
41. *See id.*
42. For a discussion of these grounds, see *infra* Part II and accompanying text.
43. *See* MD. R. CIV. P. 2-533(c).
44. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 57, 612 A.2d 1294, 1297 (1992) (explaining that an order granting a new trial is not immediately ap-

judgment as to the remaining parties or issues when granting a partial new trial.[45] The grant of a new trial is appealable from the judgment at the end of the second trial.[46]

Alternatively, the trial court may also conditionally rule on a motion for a new trial based on a jury's damage award.[47] The court may condition the grant of a new trial on the plaintiff's refusal of a remittitur.[48] A plaintiff who has accepted a remittitur may cross-appeal from the final judgment.[49] Although the Court of Appeals of Maryland has not addressed the issue, it appears that a denial of a plaintiff's motion for new trial may not be conditioned on the defendant's refusal of an additur.[50]

The grant of a new trial in a jury case undoes the work of one jury and often entails judicial reweighing of factual determinations—matters uniquely within the domain of the jury.[51] Traditionally, a new trial has been consistent with the right to jury trial under the Maryland Constitution[52] because the power to grant a new trial was part of the common law of England when Maryland's first constitution was adopted.[53] Yet, the historic right to jury trial entails not only the resolution of factual issues by a jury of twelve

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pealable because it is an interlocutory order).

45. *See* MD. R. CIV. P. 2-533(c).

46. *See Buck*, 328 Md. at 57, 612 A.2d at 1297.

47. *See infra* notes 48-50 and accompanying text.

48. *See* Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 501-02, 158 A.2d 125, 129 (1960) (noting that the remittitur is a well-established practice in Maryland). A remittitur is a reduction in the amount of the verdict proposed by the trial court. *See* BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

49. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (1998).

50. *See* Free State Bank & Trust Co. v. Ellis, 45 Md. App. 159, 166, 411 A.2d 1090, 1094 (1980) (noting that Maryland does not permit additur); Millison v. Clarke, 32 Md. App. 140, 143, 359 A.2d 127, 129 (1976) ("While [additur] appears not to have been recognized in Maryland, courts elsewhere which have accepted or rejected it have always done so with the understanding that, where the quantum of damages is in dispute, the grant of an additur is an alternative to a new trial and is contingent upon the defendant's acquiescence in the augmentation of the verdict."). An additur is an increase in the amount of the verdict proposed by the court. *See* BLACK'S LAW DICTIONARY 38 (6th ed. 1990).

51. *See* Fowler v. Benton, 245 Md. 540, 545, 226 A.2d 556, 560 (1967) (stating that only the jury has the right and the power to judge the weight of the evidence). For a discussion of how a new trial may infringe on the jury function, see *infra* notes 702-865 and accompanying text.

52. *See* MD. CONST., DECL. OF RIGHTS arts. 8, 23.

53. *See* JAMES ET AL., *supra* note 22, § 7.24, at 382 (observing that the practice of granting a new trial was well-established in late eighteenth century England).

individuals but the relationship between judge and jury, including the judicial means of remedying an unjust verdict that existed at common law. This was described by the Supreme Court in the context of the Seventh Amendment as follows:

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled . . . but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.[54]

Maryland similarly views the right to a jury as a package of procedural incidents that includes judicial control mechanisms.[55]

Maryland views the trial judge's power to grant a new trial as the exercise of equitable jurisdiction.[56] This view entrusts the trial judge with great discretion in disposing of a motion for new trial.[57] This discretion, in turn, mandates a narrow scope of appellate review of a trial court's disposition of such a motion—the abuse of discretion standard.[58]

Maryland courts have generally refrained from overturning a trial courts grant of a new trial except on very specific grounds. A jurisprudence has grown up around each of the grounds on which a new trial has been granted in Maryland. The case law reflects the wide discretion that has been bestowed on trial judges with respect to motions for new trial. It is clear from the case law, however, that guidelines for the trial court have been established for grounds

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54. Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899).

55. *See* Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 503, 158 A.2d 125, 130 (1960) (stating "the right to a jury trial is a right to a 'properly functioning' jury").

56. *See* Waters v. Waters, 26 Md. 53, 73 (1866) (explaining that a trial judge's power to grant a new trial is equitable in nature).

57. *See, e.g., id.* (noting that a motion for a new trial is within the "sound discretion of the [c]ourt").

58. *See* Kirkpatrick v. Zimmerman, 257 Md. 215, 217-18, 262 A.2d 531, 532 (1970) (noting that an appellate court's review of a motion for new trial is based on the abuse of discretion standard); *see also* Greenstein v. Meister, 279 Md. 275, 295, 368 A.2d 451, 463 (1977) (noting that an appellate court does not want to disturb the trial judge's discretion in considering a motion for a new trial).

other than excessive or inadequate verdicts or for verdicts against the weight of the evidence. In a sense, this is ironic in that determining whether a verdict is against the weight of the evidence, more than any other basis for granting a new trial, requires a trial court to replicate the fact-finding role of the jury. To appreciate this irony, however, one must examine the grounds on which new trials have been granted in Maryland and the circumstances under which each ground has been used to set aside jury verdicts.

A. Judicial Error in the Trial

One ground upon which a court may grant a new trial is for a judicial error resulting in prejudice against one of the parties. If the trial court has committed a prejudicial error in the course of a trial, such as an erroneous ruling regarding the admission or exclusion of evidence, the aggrieved party may give the trial court an opportunity to avoid reversal on appeal by making a motion for new trial. This is an attractive device for litigants in that resorting first to a motion for new trial does not prejudice the aggrieved party's ability to pursue correction of the prejudicial error on appeal.[59] If the purported error is prejudicial and the aggrieved party has properly preserved it for appellate review, the trial court does not have much discretion in whether to grant the new trial.[60] If denied, all prejudicial errors and final orders—including the trial court's disposition of the motion for a new trial—are reviewable by the appellate court.[61]

Even if the aggrieved party has not properly preserved the alleged error for review, such error may still be the basis of a motion for new trial. In disposing of the new trial motion, the trial court may consider the failure of the movant to make a timely and proper objection.[62] If the trial court denies the motion for a new trial, appellate review will focus on the trial court's exercise of dis-

59. Under Maryland Rule 8-202(c), if a timely motion for new trial has been made, the time for filing a notice of appeal does not begin to run until there is an order denying such motion. *See* MD. RULE 8-202(c).

60. To preserve the error, a party must object to the trial court's decision on the record. *See* Kennedy v. Crouch, 191 Md. 580, 586, 62 A.2d 582, 585 (1948) (noting that a timely objection must be made on the record); Fireman's Fund Ins. Co. v. Bragg, 76 Md. App. 709, 719, 548 A.2d 151, 156 (1988) (noting that to preserve an issue for appeal, a timely objection on the record must be made).

61. *See* B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 319 Md. 127, 132-33, 571 A.2d 1213, 1216 (1990)(construing Maryland Rule 8-131(d)).

62. *See Buck*, 328 Md. at 62, 612 A.2d at 1299.

cretion in denial of a new trial rather than the alleged error that served as basis for the motion.[63] Such a focus has significant practical implications in that the abuse of discretion standard affords a heightened level of deference to the trial court.

B. Prejudicial Occurrence During the Trial

Another common instance in which a court may grant a new trial is to prevent unfair prejudice from circumstances other than those involving the trial court's rulings on the law. The most vital means of preserving the fairness of trial by jury is to limit the jury solely to consideration of the evidence.[64] Information other than the evidence presented at trial and the trial judge's instruction compromises the fairness of the process by which the jury performs its function. Although professional ethics precepts proscribe it,[65] the most often-litigated source of prejudicial or extraneous matter is attorney argument to the jury.

Although the Court of Appeals of Maryland has recognized abuse of argument as a basis for new trial,[66] it has also recognized that "[i]f every irrelevant and inconsequent remark made by counsel in arguing a case to a jury were accepted as a ground for a mistrial, the hazards, delays, and expense of litigation would indeed be endless."[67] Owing its ability to directly observe prejudicial occurrences and provide an immediate remedy, the trial court has wide latitude in addressing such circumstances.[68]

In recent years, the Court of Appeals of Maryland has had occasion to underscore both the breadth and the limits of the trial court's discretion in dealing with prejudicial occurrences during the trial.[69] In *Buck v. Cam's Broadloom Rugs, Inc.*,[70] the plaintiff sought re-

63. *See* Myerberg, Sawyer & Rue, P.A., v. Agee, 51 Md. App. 711, 725-26, 446 A.2d 69, 76-77 (1982).

64. *See* Couser v. State, 282 Md. 125, 138, 383 A.2d 389, 396-97 (1978).

65. *See* MARYLAND LAWYERS RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1998) (providing that a lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence").

66. *See* State v. Devers, 260 Md. 360, 374, 272 A.2d 794, 801 (1971) (quoting LEWIS HOCHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE § 184, at 209-10 (2d ed. 1904)).

67. Wolfe v. State *ex rel.* Brown, 173 Md. 103, 119, 194 A. 832, 839 (1937).

68. *See* Brinand v. Denzik, 226 Md. 287, 292, 173 A.2d 203, 206 (1961).

69. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 53-62, 612 A.2d 1294, 1295-99 (1992); Medical Mut. Liab. Ins. Soc'y v. Evans, 330 Md. 1, 19-24, 622 A.2d 103, 112-14 (1993). For a discussion of *Buck*, see *infra* notes 71-96 and ac-

covery for injuries suffered in an automobile accident with a driver for the defendant.[71] The defendant's attorney engaged in a strident argument to the jury suggesting a conspiracy between the injured plaintiff and his doctor "to improperly inflate the medical bills and to improperly exaggerate the nature and extent of [the plaintiff's] injuries."[72] The jury returned a verdict for the plaintiff for $3,868.00, an amount considerably less than the medical and other special damages.[73] In granting a new trial, the trial court concluded that improper remarks by the defense counsel "caused or substantially contributed to a verdict that was unreasonably low."[74] On retrial, the jury awarded $87,000 to the plaintiff.[75]

Reversing the second jury's verdict, the Court of Special Appeals of Maryland reinstated the first jury's verdict.[76] While recognizing the trial court's traditional discretion in disposing of a motion for a new trial,[77] the court of special appeals concluded without explanation that the second verdict's twenty-three-fold increase "is sufficient to demonstrate that the circumstances in the instant case are compelling and, thus, reviewable."[78] Therefore, notwithstanding the substantial line of case law suggesting that the trial court's disposition of a new trial may not be reviewable absent extreme circumstances,[79] the court of special appeals and court of appeals nonetheless examined the trial court's exercise of its discretion.

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companying text. For a discussion of *Medical Mutual Liability Insurance Society*, see *infra* notes 98-124 and accompanying text.

70. 328 Md. 51, 58-59, 612 A.2d 1294, 1298 (1992).
71. *See id.* at 53, 612 A.2d at 1295.
72. Cam's Broadloom Rugs, Inc. v. Buck, 87 Md. App. 561, 566, 590 A.2d 1060, 1062 (1991), *rev'd, Buck*, 328 Md. 51, 612 A.2d 1294 (1992).
73. *See id.*
74. *Id.* at 567, 590 A.2d at 1062 (internal quotation marks omitted).
75. *See id.* at 569, 590 A.2d at 1064.
76. *See id.* at 579, 590 A.2d at 1068.
77. The court of special appeals stated such discretion should not be disturbed "unless the court has clearly abused its discretion under circumstances that are extraordinary or compelling or where a substantial right is denied." *Id.* at 568, 590 A.2d at 1063 (quoting Thodos v. Bland, 75 Md. App. 700, 706-07, 542 A.2d 1307, 1311 (1988) (internal quotation marks omitted)).
78. *Id.* at 569, 590 A.2d at 1064.
79. Under Maryland law, there is also a significant line of case law suggesting that this decision is unreviewable. *See, e.g.*, Auchincloss v. State, 200 Md. 310, 316, 89 A.2d 605, 607 (1952) (citing Newton v. State, 193 Md. 200, 202, 66 A.2d 473 (1949); Snyder v. Cearfoss, 186 Md. 360, 367, 46 A.2d 607 (1946); Wilson v. State, 181 Md. 1, 6, 26 A.2d 770 (1942)).

In support of its contention that the second jury verdict be overturned, the defendant argued that the plaintiff had waived his right to a new trial by failing to object to all instances of the allegedly offending argument.[80] Noting that several Maryland decisions had affirmed a trial court's denial of a new trial because the moving party had failed to object at trial to errors that served as the basis for the motion, the court of special appeals essentially engrafted the requirement of preservation of issues for appeal onto the motion for new trial.[81] Such a requirement would circumscribe the discretion of a trial court. The court stated that this limitation prevented litigants from withholding their objections—thereby losing all rights to a corrective instruction or appeal—but nonetheless retaining the ability to avoid an undesirable verdict.[82]

The court's reasoning overlooked some obvious drawbacks to such a "sandbagging" strategy for its perpetrator.[83] First, holding back an objection to objectionable conduct would restrict a party's ability to obtain appellate review through means other than a motion for new trial—a disposition that appellate courts are reluctant to disturb. It also assumes that a trial judge, who must play an unwitting part in the sandbagging if it is to be effective, will be amenable to setting aside a verdict on the basis of misconduct to which no objection was raised. The trial court in *Buck* set aside the verdict because, from its vantage point, the verdict was extraordinarily low.[84] Indeed, the intermediate court second-guessed the trial court because of the disparity between the two verdicts.[85]

Reversing the intermediate court, the Court of Appeals of Maryland deferred to the court that had observed the trial first-hand—

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80. *See Cam's Broadloom Rugs, Inc.*, 87 Md. App. at 569, 590 A.2d at 1064.

81. *See id.* at 571-73, 590 A.2d at 1064-65 (discussing Banegura v. Taylor, 312 Md. 609, 541 A.2d 969, (1988) (noting that the first opportunity to object to an excessive verdict is through a motion for new trial); Miller Bldg. Supply v. Rosen, 305 Md. 341, 503 A.2d 1344 (1986) (holding that the trial court did not abuse its discretion when it denied a motion for new trial based on an allegedly erroneous jury trial instruction); Brinand v. Denzik, 266 Md. 287, 173 A.2d 203 (1961) (holding that a trial court did not abuse its discretion when it denied a motion for new trial when counsel objected to allegedly improper remarks but did not request an instruction to the jury to disregard them)).

82. *See id.* at 576-77, 590 A.2d at 1067.

83. *See id.* at 574, 590 A.2d at 1066.

84. *See id.* at 578, 590 A.2d at 1068.

85. *See id.* at 577-78, 590 A.2d at 1068. The court of special appeals alternatively sifted through the evidence to conclude that the smallness of the first award, by itself, was insufficient to support the grant of a new trial. *See id.*

the trial court.[86] In assessing whether the trial court had abused its discretion, the court stated:

> In so doing, we are obliged to consider the breadth of discretion that is afforded a trial judge in making this type of decision. As we have seen in tracing the history of our treatment of the issue, the emphasis is has consistently been upon granting the broadest range of discretion to trial judges whenever the decision has necessarily depended upon the judge's evaluation of the character of the testimony and of the trial when the judge is considering the core question of whether justice has been done.[87]

Although the court noted that there are some situations in which a trial judge's discretion might be more limited,[88] the court ultimately insisted that "[w]e refuse . . . to substitute our judgment for that of the trial judge in this case."[89]

The court of appeals viewed the issue of a new trial as turning primarily on the trial court's view of the weight of the evidence. The court of appeals noted that the trial court was in the best position to observe "the effect of an accumulation of alleged errors or improprieties by defense counsel, no one of which may have been serious enough to provoke a request for, or justify the granting of, a mistrial."[90] The court concluded that because the trial court's discretion under these circumstances "depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal."[91]

The court of appeals's holding demonstrates the continued vitality of the discretion of the trial court with respect to new trial motions. Like the court of special appeals,[92] the court of appeals

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86. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 62, 612 A.2d 1294, 1300 (1992).
87. *Id.* at 57, 612 A.2d at 1297.
88. *See id.* at 56-58, 612 A.2d at 1297-98 (citing Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984) (considering juror misconduct); Washington, Baltimore & Annapolis Elec. R.R. v. Kimmey, 141 Md. 243, 253, 118 A. 648, 652 (1922) (considering newly discovered evidence)).
89. *Id.* at 61, 612 A.2d at 1299.
90. *Id.* at 59, 612 A.2d at 1298.
91. *Id.*
92. *See* Cam's Broadloom Rugs, Inc. v. Buck, 87 Md. App. 561, 567-69, 590 A.2d 1060, 1062-64 (1991).

did not independently assess whether the defense counsel's allegedly improper argument warranted a new trial.[93] Yet, the court of appeals did not give its unfettered support to the trial court's exercise of its discretion. The Court of Appeals of Maryland agreed with the lower appellate court that the movant's failure to object to the counsel's argument is a significant factor to be considered by the trial court when a motion for a new trial is made.[94] Although the plaintiff essentially argued that the verdict was against the weight of the evidence as a result of the unfairly prejudicial arguments,[95] there is at least an implication in the court of appeals's opinion that the plaintiff's failure to object sufficiently to the prejudicial argument might have prevented the trial court from granting a new trial on that basis alone.[96] If so, *Buck* represents a diminution of the trial court's discretion to grant a motion for a new trial.

The trial court's discretion may even be sharply circumscribed in cases of egregious conduct. *Medical Mutual Liability Insurance Society of Maryland v. Evans*[97] demonstrates that when there is a timely objection to prejudicial conduct by an attorney, the trial judge's discretion with respect to a new trial may be circumscribed—he or she may have to grant a new trial (or mistrial) if the misconduct is sufficiently serious. In *Medical Mutual*, Evans, a victim of medical malpractice, brought suit against a malpractice insurer for bad faith failure to settle a claim.[98] The physician, against whom the jury rendered a $2.5 million verdict, assigned his claim against the insurer to Evans.[99] The physician's policy limit was $1 million.[100] The best offer made by the insurer prior to trial was a high-low agreement of $400,000/$1,000,000.[101]

A question by plaintiff's counsel implying that a witness had asserted a claim for bad faith failure to settle against the defendant tarnished the first trial.[102] No such claim had been filed against or

93. *See Buck*, 328 Md. at 62, 612 A.2d at 1299.
94. *See id.*
95. *See id.* at 62, 612 A.2d at 1299-1300.
96. *See id.*
97. 330 Md. 1, 622 A.2d 103 (1993).
98. *See id.* at 5, 622 A.2d at 104.
99. *See id.*
100. *See id.*
101. *See id.* at 13, 622 A.2d at 109. Under such an agreement, the plaintiff would receive no less than $400,000 and the defendant would have to pay no more than $1,000,000. *See id.*
102. *See id.* at 14-15, 622 A.2d at 109.

paid by the defendant.[103] As a result, the trial court declared a mistrial.[104]

At the second trial, the trial court empaneled a jury that included ten women who were forty-years-old or younger.[105] The plaintiff's lawyer attempted to elicit testimony that the defendant's alleged bad faith failure to settle Evans's claim stemmed from personal animus between the witness and the plaintiff's counsel.[106] To make his point, plaintiff's counsel questioned defendant's witness about a prior medical malpractice case, in which the plaintiff's lawyer represented a woman whose reproductive organs had been removed without her consent when she was twenty-eight years old.[107] The plaintiff's lawyer demanded $300,000 to settle the case, to which the witness responded with an offer of $23,000.[108] In the subsequent trial, the jury awarded $1.4 million to the plaintiff—$400,000 more than the doctor's coverage.[109] Accusations of the insurance company's bad faith were never adjudicated.[110] Medical Mutual promptly moved for a mistrial which the trial court denied.[111] The trial court also denied Medical Mutual's motion for a new trial.[112]

Reversing the trial court's denial of the two motions,[113] the Court of Appeals of Maryland noted at the outset that appellate review of the denial of a motion for mistrial—which was made on the same basis as the motion for new trial—is limited to determining whether there has been an abuse of discretion by the trial judge.[114] The court observed, however, that where there is a question of prejudice and a curative instruction rather than a mistrial is the remedy chosen by the trial court, the appellate court "must determine 'whether the evidence was so prejudicial that it denied the defendant a fair trial;' that is, whether 'the damage in the form of

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103. *See id.* at 15, 622 A.2d at 109.
104. *See id.* at 5, 622 A.2d at 105.
105. *See id.* at 15, 622 A.2d at 110.
106. *See id.* at 16-17, 622 A.2d at 110-11. The plaintiff began with a question to the witness: "Would it be fair to say, sir, that you and I have had some battles over the years, haven't we?" *Id.* at 16, 622 A.2d at 110.
107. *See id.* at 16-17, 622 A.2d at 110.
108. *See id.* at 17, 622 A.2d at 110.
109. *See id.*
110. *See id.* at 18, 622 A.2d at 111.
111. *See id.* at 17-18, 622 A.2d at 111.
112. *See id.* at 19, 622 A.2d at 111.
113. *See id.* at 32, 622 A.2d at 118.
114. *See id.* at 19, 622 A.2d at 112.

prejudice to the defendant transcended the curative effect of the instruction.'"[115]

The court viewed the question as an improper inquiry into the witness's prior bad acts,[116] which would be admissible only if "the trial judge is satisfied that there is a reasonable basis for such questioning, 'that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial.'"[117] Even more fundamentally, however, the prior bad acts to which Evans's attorney referred were merely accusations and never actually adjudicated.[118] The court noted that "mere accusations of crime . . . may not be used to impeach."[119] The court saw no basis to refer to payment of money above the policy limits on an assigned bad faith claim by another plaintiff when there had been no adjudication of bad faith.[120]

The court underscored this conclusion with the apparent motives underlying the attorney's line of questioning. The implication of bad faith combined with a statement that the witness had undervalued the unauthorized removal of a young woman's uterus before a jury made up largely of women of child-bearing age, suggested to the court that the primary purpose of the questioning was to harass the witness and to suggest that the defendant had "a parsimonious and insensitive reaction to an involuntary and irreversible sterilization of a young woman."[121] The court noted that the cross-examination had been planned by the plaintiff's lawyer, in that he had the file from the earlier case at the time of the cross-examination.[122] The Court of Appeals of Maryland found error in the trial court's denial of a mistrial and a new trial[123] because the prejudice to the defendant "transcended the curative instruction."[124]

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115. *Id.* at 19-20, 622 A.2d at 112 (quoting Rainville v. State, 328 Md. 398, 408, 614 A.2d 949, 953-54 (1992)(quoting Kosmas v. State, 316 Md. 587, 594, 560 A.2d 1137, 1141 (1989))).

116. *See id.* at 20, 622 A.2d at 112.

117. *Id.* (quoting State v. Cox, 298 Md. 173, 179, 468 A.2d 319, 322 (1983)).

118. *See id.* at 20-21, 622 A.2d at 112.

119. *Id.* (quoting State v. Cox, 298 Md. 173, 179, 468 A.2d 319, 322 (1983) (internal quotation marks omitted)).

120. *See id.*

121. *Id.* at 21-22, 622 A.2d at 113.

122. *See id.* at 24, 622 A.2d at 114. Ultimately, the impropriety was in the failure of plaintiff's attorney to resolve the admissibility of the matter of the questioning in a motion in limine. *See id.*

123. *See id.* at 24, 622 A.2d at 114.

124. *Id.* This instruction did not appear to address specifically the mischief of the

In one sense, *Buck* and *Evans* are inconsistent. Overturning a trial court's exercise of its discretion in the disposition of a motion for new trial, the *Evans* court took the same initiative that it had reversed in *Buck*.[125] The effect of the purported misconduct appears to be the only point of departure between the two cases. In *Buck*, the trial and appellate courts seemingly believed that the prejudicial argument affected the weight of the evidence. The error of the court of special appeals was in placing so much weight on the failure to object; the possibility of prejudice in *Buck* was apparent only in hindsight once the verdict had been returned. That is often the case with inadequate or excessive verdicts.

Although the court of appeals in *Evans* addressed the trial court's denial of the motion for a new trial, most of its analysis was directed at the failure to grant a mistrial. The *Evans* court emphasized that the trial court had stringently limited questioning with respect to "bad acts"[126] and that this limitation should have deterred the plaintiff's lawyer from engaging in the prejudicial line of questioning without warning.[127] The *Evans* court emphasized how the questions obfuscated the jury's consideration of the insurer's good faith—the jury sent twenty-two notes to the judge during the trial asking for guidance.[128]

Unlike the *Buck* court, the court in *Evans* did not focus on the trial court's power with respect to the weight of the evidence. The court of appeals did not assess the size of the verdict. Thus, even where attorney misconduct is asserted as a prejudicial occurrence, if the overriding issue with respect to new trial is the weight of the evidence, *Evans* does not appear to limit the broad scope of trial court discretion that *Buck* reaffirmed. If the purported misconduct is so severe that it would have called for a mistrial, the trial judge's generally broad power to deny a mistrial will not shield from appellate scrutiny his or her refusal to set aside the verdict or abort the trial. Generally, the prejudicial occurrence that takes the inquiry out of the realm simply of whether the verdict is against the weight

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offending conduct at all; it simply required the jurors to decide the case "based on the evidence presented and do that with impartiality, devoid of prejudice, and with fairness to both sides." *Id.* at 18-19 n.13, 622 A.2d at 111 n.13.

125. For a discussion of *Buck*, see *supra* notes 71-96 and accompanying text.

126. *Evans*, 330 Md. at 20-22, 622 A.2d at 112-13.

127. *See id.* at 18, 622 A.2d at 111.

128. *See id.* at 22-23, 622 A.2d at 113.

of the evidence must be severe in nature.[129]

C. Juror Misconduct

The scope of the trial judge's power with respect to motion for a new trial in the case of alleged juror misconduct reflects a meshing of three policy considerations. The first is that the verdict must be based upon the evidence in the case considered in the manner instructed by the court.[130] The second is that jurors are not permitted to impeach their verdict.[131] The third is that when juror misconduct serves as the basis for a motion for new trial or mistrial, Maryland courts have mandated that:

> The better rule in such cases would seem to be that such questions be left to the sound discretion of the trial court, whose decision should only be disturbed in those cases where there has been a plain abuse of discretion, resulting in palpable injustice. Especially should this be true in cases where there is conflict of evidence as to whether the act constituting the alleged misconduct in fact occurred.[132]

The second policy, that against jurors impeaching their own verdicts, has the salubrious effect of insulating verdicts from attack in that the most obvious weapon is taken from the hands of the attacker. Although trial judges have been implored to consider juror affidavits many times in reported decisions, they have resisted and been upheld.[133] Trial courts do have discretion in assessing the effects of juror misconduct where there is evidence other than juror

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129. The court of appeals has indicated that a showing of "grave error [or] lack of due process" requires appellate reversal of denial of a new trial when there has been prejudicial argument. Safeway Trails, Inc. v. Smith, 222 Md. 206, 221, 159 A.2d 823, 831 (1960). Such a standard allows a great deal of latitude to the trial court in deciding motions for new trial based on rhetorical excess of counsel. *See id.* As to motions for new trial based on prejudicial occurrences other than those occasioned by improper impeachment evidence or inflammatory argument, it is clear that one who would urge error in a trial court's denial of a new trial must demonstrate prejudice from such occurrence. *See* Michigan Nat'l Bank v. Racine, 234 Md. 250, 253-54, 198 A.2d 898, 899 (1964) (determining that the loss of stenographer's notes of trial did not require a new trial absent showing of prejudice of such loss to movant).

130. *See* Western Md. Dairy Corp. v. Brown, 169 Md. 257, 268, 181 A. 468, 473-74 (1935).

131. *See* Oxtoby v. McGowan, 294 Md. 83, 101, 447 A.2d 860, 870 (1982).

132. Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 Md. 401, 409, 163 A. 702, 705-06 (1933).

133. *See, e.g., Oxtoby*, 294 Md. at 102, 447 A.2d at 870.

testimony. In such cases the third policy prevails and the trial judges have had broad discretion.

The rationale for the Maryland rule with respect to impeachment of a verdict through juror testimony was elaborated by Judge Archer in *Bosley v. Chesapeake Insurance Co.*:[134]

> [W]ere the law different, an inquisition might be instituted in every case, into the grounds and motives of a jury for their finding, in order to ascertain whether, in coming to given conclusions, they had not mistaken facts. Verdicts of juries, would then in all cases be uncertain. To permit such inquisition into the motives of juries, would it appears to me, be against public policy, and lead more frequently to the prostration of justice, than to its preservation.[135]

There is no reason to believe, in this age when the multimillion dollar verdict has become commonplace, that importuning tactics of disappointed litigants and their counsel would be any less sophisticated or insidious than those of the early nineteenth century. Thus, Maryland has consistently reaffirmed the preclusion of juror testimony in support of allegations of juror misconduct and denied motions for a new trial based upon this evidence.[136]

Where there is evidence of juror misconduct other than the testimony of the jurors themselves, such evidence may be considered in deciding a motion for new trial.[137] The decisions that have allowed consideration of matters other than juror testimony in evaluating potential juror misconduct indicate that the trial court has broad discretion in determining whether such evidence warrants a new trial.[138] The standard applied by the appellate courts in decid-

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134. 3 G. & J. 450 (1831).

135. *Id.* at 473.

136. *See* Christ v. Wempe, 219 Md. 627, 641, 150 A.2d 918, 925 (1959) (noting that the rule that a juror cannot be heard to impeach his or her verdict is well settled in Maryland); *Oxtoby*, 294 Md. at 101-02, 447 A.2d at 870 (holding that a juror cannot be heard to impeach his or her verdict even where there is evidence of juror misconduct); Braun v. Ford Motor Co., 32 Md. App. 545, 551, 363 A.2d 562, 566 (1976) (holding that the trial court did not abuse its discretion in denying a motion for a new trial where juror misconduct was alleged).

137. *See Oxtoby*, 294 Md. at 101-02, 447 A.2d at 870; *Christ*, 219 Md. at 642, 150 A.2d at 926.

138. *See, e.g.*, Wernsing v. General Motors Corp., 298 Md. 406, 420, 470 A.2d 802, 809 (1984) ("It is the function of the trial judge when ruling on a motion for a new trial to evaluate the degree of probable prejudice and whether it justifies a new trial. That judgment will not be disturbed but for an abuse of dis-

ing whether a trial court has abused its discretion assures that such discretion is broad.[139]

Wernsing v. General Motors Corp.[140] is the leading case addressing the motion for new trial on the basis of juror misconduct relying on evidence other than juror testimony. Although the Court of Appeals of Maryland reversed the trial court's disposition of a motion for new trial,[141] *Wernsing* demonstrates the breadth of the trial court's discretion in such circumstances.

In *Wernsing*, the plaintiff was injured when she was pinned between two automobiles, her own and that of one of the defendants, Howard Seidel.[142] The Seidel vehicle lurched forward when he moved the gear shift from "park" to "drive."[143] The injured plaintiff and her two children sued Seidel, GeneralMotors (GMC), the manufacturer, and the dealer who had sold the Seidel vehicle.[144]

GMC and the dealer contended that there was no defect in the Seidel vehicle at the time of the plaintiff's injury and that the occurrence was caused by Seidel's negligent driving.[145] With respect to strict liability on the part of GMC and the dealer, the trial court instructed the jury that the plaintiffs were required to prove "that the [vehicle] was in an unreasonably dangerous condition when sold and that the defective condition was a proximate cause of the accident."[146] The plaintiffs won verdicts against the defendants jointly and, after the plaintiffs accepted remittiturs, the trial court denied the defendants' motion for new trial.[147] In review, the court of appeals first assessed the propriety of the evidence offered by defendants in support of the new trial[148] and, second, the degree of prejudice from such misconduct that such evidence must show to require a new trial.[149]

The alleged misconduct involved the jury's use of a dictionary to determine the meaning of "proximate cause," a term used in the

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cretion.").

139. *See id.*

140. 298 Md. 406, 470 A.2d 802 (1984).

141. *See id.* at 420, 470 A.2d at 809.

142. *See id.* at 408, 470 A.2d at 803.

143. *See id.*

144. *See id.*

145. *See id.* at 409, 470 A.2d at 803.

146. *Id.* at 410, 470 A.2d at 804 (internal quotation marks omitted).

147. *See id.* The court of special appeals, on the basis of juror misconduct, reversed the trial court's denial of defendant's motion for new trial. *See id.*

148. *See id.*

149. *See id.* at 414-15, 470 A.2d at 806.

trial court's instructions.[150] Two events occurred during jury deliberations: the jury foreman sent a note to the judge requesting a definition of proximate cause and the foreman obtained a dictionary from the bailiff.[151] The trial judge defined proximate cause as "legal cause."[152] On the back of the note signed by the judge were longhand notes of the foreman containing a reference to a page in the dictionary the bailiff provided and a definition of "legal" as "having a formal status derived from law often without basis in actual fact."[153]

In addition to these notes and the dictionary, the defendant submitted affidavits of jurors and testimony from the bailiff who provided the dictionary.[154] Denying the motion for a new trial, the trial court observed that allowing jurors to overturn their verdicts by post-trial affidavits would "create havoc."[155] In so deciding, however, the court failed to differentiate between the juror affidavits and other evidence of juror misconduct.[156] The court of appeals considered only the jury notes and the testimony of the bailiff in determining if the trial judge abused his discretion.[157]

The court rejected the Wernsings' contention that prejudice could be shown only by demonstrating that one or more jurors were influenced by "legally incorrect matter found in a dictionary."[158] Such a standard could not be met because Maryland law precludes direct evidence of the effect of the extraneous matter on juror deliberations.[159] The court concluded that the trial judge was required to evaluate the degree of probable prejudice from the extraneous matter.[160]

The court of appeals viewed the foreman's notes as demonstrating that at least one juror understood proximate cause as not re-

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150. *See id.* at 408-10, 470 A.2d at 803-04.

151. *See id.* at 413-14, 470 A.2d at 806. The bailiff was uncertain as to whether the jury first requested the dictionary or asked the judge for the definition of proximate cause. *See id.*

152. *See id.* at 413, 470 A.2d at 806.

153. *Id.* at 414, 470 A.2d at 806.

154. *See id.* at 410-11, 470 A.2d at 804. A bystander's affidavit was also utilized at the hearing on the motion for new trial. *See id.*

155. *Id.* at 414, 470 A.2d at 806.

156. *See id.*

157. *See id.*

158. *Id.* at 418, 470 A.2d at 808.

159. *See id.*

160. *See id.* at 419-20, 470 A.2d at 809.

quiring a basis in fact.[161] Such an approach "[w]ould mean that all of the evidence, including expert opinions, in this protracted and complex products liability case would have been disregarded."[162] The court held that the degree of probable prejudice from such circumstances was so great that it was an abuse of discretion to deny a new trial.[163]

At the time *Wernsing* was decided, it might have been contended that the court based its analysis of prejudice on the probability that the jury considered the extraneous matter, rather than the probability that such matter actually had a prejudicial effect on the outcome.[164] Such a standard would likely deprive the trial court of the power to assess the effects of potentially prejudicial influences under the circumstances and require that certain extraneous influences automatically require a new trial. Later decisions demonstrate that *Wernsing* has not so limited a trial judge's discretion.

The most significant such decision is *Harford Sands, Inc. v. Groft*.[165] In that case, Harford's sand pit was flooded when some youngsters breached a dam that contained a holding pond above the pit.[166] The sand pit became a lake and, according to the plaintiff, was unsuitable for sand mining.[167] The plaintiff also claimed that it was unable to afford repairs for the flooded pit and that it had to procure sand from another source, causing additional financial loss.[168] The main issue at trial was whether the plaintiff could have avoided most of the alleged harm from the defendants' misdeeds through prompt repairs at a reasonable cost.[169] The jury returned a verdict for the plaintiff in the amount of $4,000 rather than the $1.1 million plaintiff sought.[170]

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161. *See id.* at 420, 470 A.2d at 809.

162. *Id.*

163. *See id.*

164: This is demonstrated by the court's quoting of a New Jersey intermediate appellate decision involving a dictionary, albeit by then Judge William J. Brennan, which appeared to require a new trial if the extraneous matter on its face "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Palestroni v. Jacobs, 77 A.2d 183, 185 (N.J. Sup. Ct. 1950).

165. 320 Md. 136, 577 A.2d 7 (1990).

166. *See id.* at 139, 577 A.2d at 8.

167. *See id.*

168. *See id.* at 139-40, 577 A.2d at 8.

169. *See id.* at 140, 577 A.2d at 9.

170. *See id.* at 138, 577 A.2d at 8.

The alleged juror misconduct in *Harford Sands* was a conversation by a juror with construction workers about the subject matter of expert testimony during the trial.[171] During the testimony of the plaintiff's expert, the judge advised counsel that he had received a note from a juror inquiring about the feasibility of using a concrete pumping machine from the service road to repair the dam.[172] The attorney asked the witness whether that might have been done.[173] The witness testified that using a concrete pumping machine would not have been feasible because the breach was "five hundred feet or something" from the service road.[174] At the end of the expert's testimony, the court admonished the jury:

> [O]nce you get this case for deliberation your decision is to be based solely on the evidence presented to you from both sides.
> You are not to infuse your own ideas of any knowledge you may have of construction or storm water management or sediment control. It is only to be based upon the evidence that is presented . . . through the various witnesses.[175]

At the hearing in support of a motion for a new trial, the plaintiff submitted affidavits from Caroll O'Keefe, the juror who spent a luncheon break during the trial at a nearby construction site and the two construction workers with whom he spoke.[176] The plaintiff also produced affidavits from a spectator at the trial, with whom O'Keefe also spoke, and plaintiff's trial counsel who claimed that O'Keefe admitted his conversations with construction workers to him.[177]

The construction workers testified that O'Keefe spoke with them about concrete pumping machines.[178] One stated that he told O'Keefe that they could be used to pump concrete laterally over half a mile.[179] The plaintiff's trial counsel stated that O'Keefe told him after trial that he disregarded the opinion of the plaintiff's expert about the cost of repairing the dam because of what the con-

171. *See id.* at 140-41, 577 A.2d at 9.
172. *See id.* at 140, 577 A.2d at 9.
173. *See id.*
174. *Id.* (internal quotation marks omitted).
175. *Id.* at 141, 577 A.2d at 9.
176. *See id.* at 141-43, 577 A.2d at 9-10.
177. *See id.*
178. *See id.* at 142, 577 A.2d at 10.
179. *See id.*

struction workers had told him.[180] The spectator swore that O'Keefe told her that he was "the strongest member of the jury" and he had "convinced the other jurors what the 'real' facts were."[181]

The trial court accepted only the affidavits of the construction workers in connection with the motion for a new trial.[182] The court determined that the *Wernsing* test required it to determine "whether there [was] a probability of prejudice from the juror misconduct."[183] The court denied the plaintiff's motion on the basis that it could not infer that the jury as a whole disregarded "their obligations to decide the case based solely upon the evidence" from the fact that one juror talked to someone about a pumping machine.[184]

Before the court of appeals, the plaintiff depicted O'Keefe as having spun a "web of deceit" on the basis of his hostility to the plaintiff's theory of the case.[185] It is admittedly difficult to imagine many things more corrosive of the fairness of the jury process than the lunchtime sleuthing of O'Keefe. The court of appeals agreed that the knowledge O'Keefe obtained might have discredited the plaintiff's expert and that if one or more jurors had employed this information, "it would have had a serious effect on the plaintiff's case."[186] To this point the juror misconduct appeared to present the same threat to the fairness of the trial that the dictionary had done in *Wernsing*: the threat that vital expert testimony would be rejected.[187]

The court of appeals seized upon two critical differences between *Wernsing*[188] and *Harford Sands* in holding that the trial court had not abused its discretion in denying the motion for new trial.[189] The first was that in *Harford Sands*, it was not possible to determine that O'Keefe had employed the fruits of his investigation in jury deliberations without resort to his affidavit or the testimony of those who spoke with him after the trial about his deliberations.[190] Consid-

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180. *See id.*
181. *Id.* at 142-43, 577 A.2d at 10.
182. *See id.* at 143, 577 A.2d at 10.
183. *Id.*
184. *Id.*
185. *See id.*
186. *Id.* at 148-49, 577 A.2d at 10.
187. *See supra* notes 161-63 and accompanying text.
188. For a discussion of *Wernsing*, see *supra* notes 141-164 and accompanying text.
189. *See Harford Sands*, 320 Md. at 150, 577 A.2d at 13.
190. *See id.* at 144, 577 A.2d at 11.

eration of such evidence was not permitted.[191] In *Wernsing*, there was permissible evidence that at least one juror had used the extraneous dictionary evidence in deliberations—the note of the juror.[192]

Secondly, the *Harford Sands* court found considerable indication in the record that it was not extraneous matter that led the jury in *Harford Sands* to decide as it did.[193] The supposedly discredited witness also testified that soil conditions on the dam were such that concrete would not have been usable to repair the breach.[194] The court reviewed other evidence that cast doubt on the plaintiff's own estimate of its losses.[195] In light of this other evidence, the court of appeals was unable to conclude that the concrete pump information probably resulted in prejudice to the plaintiff.[196]

On one level, the distinction between *Harford Sands* and *Wernsing* is difficult to grasp. The critical difference between the two cases—the demonstration in *Wernsing* of the probability of prejudice—hinged on the circumstantial evidence in *Wernsing* that a juror resorted to extraneous material in deliberations.[197] Comparison of the two cases, however, demonstrates the firmness of the rule against upsetting jury verdicts based on juror testimony. The existence of other evidence of actual jury consideration of improper matter, something which is not likely to be encountered very often, can reduce the scope of the trial judge's discretion. The trial judge will not be overturned, however, when there is only a possibility of improper influence on the verdict by extraneous matter.[198]

This is underscored by the decision of the court of special appeals in *Smith v. Pearre*.[199] In *Smith*, the estate of a decedent who had died of cancer sought recovery for medical malpractice.[200] The defendant doctor conducted only a lower gastrointestinal (GI) ex-

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191. *See id.* at 144-45, 577 A.2d at 11.

192. *See id.* at 144-45, 577 A.2d at 11-12. The court in *Wernsing* had stated that resort to this note in reviewing the trial court's denial of the new trial was permissible because it was generated *during* the jury's deliberations and thus did not "suffer the taint of possible post-verdict importuning." Wernsing v. General Motors Corp., 298 Md. 406, 413, 470 A.2d 802, 805 (1984).

193. *See Harford Sands*, 320 Md. at 149-50, 577 A.2d at 13.

194. *See id.* at 149, 577 A.2d at 13.

195. *See id.* at 149-50, 577 A.2d at 13.

196. *See id.* at 150, 577 A.2d at 13.

197. *See id.* at 150, 577 A.2d at 11; *see also supra* notes 141-63 and accompanying text.

198. *See Harford Sands*, 320 Md. at 150, 577 A.2d at 13.

199. 96 Md. App. 376, 625 A.2d 349 (1993).

200. *See id.* at 380-81, 625 A.2d at 351.

amination on the decedent in 1988 and had not found any trace of cancer.[201] In 1989, when the decedent suffered a recurrence of rectal bleeding, an upper GI revealed untreatable cancer that might have been detected, and therefore treated, had an upper GI been performed in 1988.[202]

After a verdict for the defendant, the plaintiff moved for a new trial, relying in part on a post-verdict telephone survey of the jury that suggested some impropriety.[203] Contrary to the admonitions of the trial judge, the jury foreman watched a "60 Minutes" segment that suggested that the possibility of litigation pressured doctors to perform unnecessary medical tests.[204] On the motion for a new trial, the plaintiff argued that "the statements made during the program would apply as a defense and as an excuse for not performing an upper GI series."[205] Analogizing the situation to that in *Harford Sands*,[206] the trial court concluded that there was no evidence that the juror in *Smith* took the "60 Minutes" segment to mean that the tests the defendant did not perform were unnecessary.[207] The court was not convinced that the plaintiff had been prejudiced because there was only a possibility that the juror had been influenced by the segment.[208]

It is clear that *Harford Sands* and *Smith* set out the scope of discretion possessed by the trial judge with respect to a motion for new trial based on juror misconduct.[209] *Wernsing's* reversal of the trial judge's action[210] in such a case simply represents a tempering of the general rule to circumstances in which evidence that is usually unavailable demonstrates a probability of prejudice.

D. Newly Discovered Evidence

Maryland appellate courts have established guidelines that a trial court must observe in deciding a motion for new trial. It is clear that there are circumstances in which a trial court is virtually compelled to set aside a judgment or verdict based on newly discov-

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201. *See id.*
202. *See id.*
203. *See id.* at 389-91, 625 A.2d at 355-58.
204. *See id.*
205. *Id.* at 390, 625 A.2d at 356 (internal quotation marks omitted).
206. *See id.*
207. *See id.* at 391, 625 A.2d at 356.
208. *See id.*
209. *See supra* notes 165-208 and accompanying text.
210. *See supra* notes 141-64 and accompanying text.

ered evidence.[211] It is somewhat less clear, however, that Maryland's appellate courts would ever be willing to reverse the *grant* of a new trial based solely on newly discovered evidence.

The actual proffer of the newly discovered evidence constitutes the baseline for trial courts with respect to motions for a new trial based on newly discovered evidence.[212] Maryland courts have not viewed this requirement as a limit on a trial court's discretion but rather as an element of the exercise of discretion to which parties have a legal right.[213] A trial court's consideration of this new evidence in disposing of a motion for a new trial is governed by five requirements established by the court of special appeals:

> (1) the evidence was discovered since the trial; (2) there was diligence in attempting to discover the evidence on the part of the movant; (3) the evidence relied on is not cumulative or impeaching; (4) it is material to the issues involved; and (5) on a new trial, the newly discovered evidence would probably produce a different result.[214]

If a party seeking a new trial was aware of evidence capable of yielding a different result and failed to exploit it, such evidence may not be the basis of a new trial because the evidence was not discovered after the trial.[215] Likewise, a document that a party had in its custody, but did not discover before trial, may not serve as the basis for the grant of a new trial.[216] Evidence that simply contradicts testimony, even perjured testimony,[217] or impeaches the opponent's evi-

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211. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 58, 612 A.2d 1294, 1297 (1992) (stating that a motion for new trial should be granted if newly discovered evidence indicates that the jury has been misled, a different result would have been reached, or certain information should not have been admitted into evidence).

212. *See id.*

213. *See* Browne v. Browne, 22 Md. 103, 112 (1864) (noting that a party has a legal right to the proffer of newly discovered evidence).

214. Market Tavern, Inc. v. Bowen, 92 Md. App. 622, 649, 610 A.2d 295, 309 (1992).

215. *See* Great Southwest Fire Ins. Co. v. S.M.A., Inc., 59 Md. App. 136, 148, 474 A.2d 950, 956 (1984) (holding that evidence known to the insurer before trial is not newly discovered evidence and is not a basis for granting a new trial).

216. *See* Maryland Coal & Realty Co. v. Eckhart, 25 Md. App. 605, 616-17, 347 A.2d 150, 157 (1975) (holding that a document accidently discovered in the party's own vault did not support the grant of a new trial).

217. *See* Wilmer v. Placide, 127 Md. 339, 342-43, 96 A. 621, 622 (1915) (concluding that perjured testimony will not support the grant of a new trial).

dence[218] may not be the basis for a new trial.[219] These requirements underscore the strong policy "that there be an end to litigation."[220] As the court of appeals stated long ago: "It is a salutary principle of law, that every person is bound to take care of and protect his own rights and interests, and to vindicate them in due season, and in the proper place."[221]

There are instances, however, when the newly discovered evidence is not simply cumulative, contradicting, or impeaching, and in which the policy of ending litigation must yield. When the newly discovered evidence probably would have produced a different result in the first trial, assuming the other requirements for granting a new trial on the basis of newly discovered evidence are met, the trial court must grant the new trial.[222]

Such a rule assumes that the appellate courts possess the power to reverse a trial court when it does not grant a new trial in such circumstances. Given the historically broad scope of discretion exercised by trial courts in disposing of new trial motions, the Maryland appellate courts' power cannot be lightly assumed. Formerly, appellate review of a trial court's disposition of a motion for a new trial was permitted only when the action of the trial court was viewed as depriving the movant for a new trial of some substantial right.[223] This deference regarded the trial court's discretion as "a high prerogative to be exercised for the purpose of assuring a sound, correct, and impartial judicial trial."[224] To allow an exercise of such discretion to overlook a patently wrong result would entail overlooking the purpose for reposing such discretion in the trial judge.

The leading case of this sort is *Washington, Baltimore & Annapolis Electric Railroad Co. v. Kimmey*.[225] In that case, Kimmey sued a

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218. *See* Gott v. Carr, 6 G. & J. 309, 315 (1834) (holding that a new trial may not be granted merely for the purpose of giving a party the opportunity to impeach a witness' testimony).

219. *See id.*; *supra* notes 211-14 and accompanying text.

220. *Wilmer*, 127 Md. at 341, 96 A. at 622 (quoting JOHN NORTON POMEROY, JR., 6 POMEROY'S EQUITY JURISPRUDENCE § 649 (1905)).

221. *Gott*, 6 G. & J. at 312.

222. *See* Market Tavern, Inc. v. Bowen, 92 Md. App. 622, 649, 610 A.2d 295, 309 (1992) (noting that in order to grant a motion for a new trial, the newly discovered evidence "would probably produce a different result").

223. *See* State *ex rel.* Scruggs v. Baltimore Transit Co., 177 Md. 451, 454-55, 9 A.2d 753, 754 (1939) (noting that appellate review is only available where a party was denied a substantial right).

224. *Id.* at 454, 9 A.2d at 754.

225. 141 Md. 243, 118 A. 648 (1922).

streetcar company for injuries allegedly suffered in a derailment.[226] She contended that an injury to the side of her body—allegedly caused when the defendant's streetcar derailed—resulted in frequently recurring uterine hemorrhages.[227] The jury returned a verdict for $13,500.[228] The defendant moved for a new trial the day the jury rendered its verdict,[229] relying on affidavits and deposition testimony to argue that the plaintiff's medical condition antedated the occurrence at issue in the suit.[230] A woman who shared a hospital room with Kimmey stated that the plaintiff's uterine bleeding preceded the occurrence.[231] A matron of the barracks at Camp Meade, Maryland, where the plaintiff lived, attributed Kimmey's condition to the collapse of a building in Albany, New York where she once worked.[232] The plaintiff's former employer explained that his firm compensated the plaintiff with respect to that occurrence to settle a suit for damages.[233] Two doctors noted that they had determined that the plaintiff experienced uterine bleeding before the derailment of defendant's streetcar.[234] The defendant offered evidence at the hearing on the motion for a new trial as to why it did not procure such testimony for use at trial.[235] The defendant provided ample evidence, two months after trial, that the plaintiff was probably using the derailment as a pretext to recover a second time for injuries that resulted from a previous occurrence.[236]

Whether even to consider this evidence was a point of departure between the appellate and trial courts. The trial court granted a motion *ne recipiatur* as to the affidavits because the defendant had failed to timely notify the plaintiff of its intention to use the affidavits and depositions.[237] The appellate court determined that, at the hearing on the new trial, the plaintiff waived any objections to lack

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226. *See id.* at 245, 118 A. at 648.
227. *See id.*
228. *See id.* at 245, 118 A. at 649.
229. *See id.* at 247, 118 A. at 649.
230. *See id.*
231. *See id.* at 247, 118 A. at 649-50.
232. *See id.* at 247-48, 118 A. at 650.
233. *See id.* at 248, 118 A. at 650.
234. *See id.*
235. *See id.* The decision does not indicate what this evidence of due diligence was.
236. *See id.*
237. *See id. Ne recipiatur* literally translates to mean "that it be not received." BLACK'S LAW DICTIONARY 1040 (6th ed. 1990). It is "a caveat or warning given to a law officer, by a party in a cause not to receive the next proceedings of his opponent." *Id.*

of proper notice of submission of the defendant's affidavits.[238] Focusing on Kimmey's "virtual assent" to the defendant's use of the testimony and affidavits, the appellate court concluded that Kimmey had waived her right to notice.[239]

The court of appeals determined that if the trial court had felt free to consider the affidavits, "it is hardly conceivable that a new trial would have been refused."[240] The court continued:

> [I]t would be plainly unjust to permit a verdict to stand, as against an application for a new trial seasonably made, if credible evidence, competent to be considered, and not previously discoverable by due diligence, supported the conclusion that the jury were misled as to a principal part of their award.[241]

The court of appeals acknowledged the rule that the disposition of a trial court of a motion for new trial, at that time, could not be overturned on appeal.[242] Focusing instead on the exclusion of the defendant's evidence offered in support of the new trial, the court avoided this conundrum.[243] The court concluded that the trial court's discretion and judgment should have been influenced by this evidence[244] and that the defendant was entitled to have them given due probative effect.[245]

The court insisted that the appeal was not from the order overruling the motion for new trial, but rather from the judgment rendered after a new trial was refused, and the exclusion of the defendant's new evidence constituted the grounds for the appeal.[246] In a sense, however, the court ruled on the motion for a new trial

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238. *See Kimmey*, 141 Md. at 249, 118 A. at 650.

239. *See id.* The trial court explained:

> At the time of the presentation, in open court, of the depositions we have mentioned, no objection was made to them on the ground about to be noticed. In fact, there was a virtual assent to their admission. They were treated on both sides and by the court, during the greater part of the time occupied by the hearings, as being regularly in the case for the purposes for which they were offered.

Id.

240. *Id.* at 250, 118 A. at 650.

241. *Id.*

242. *See id.*

243. *See id.* at 251-52, 118 A. at 651.

244. *See id.*

245. *See id.* at 252, 118 A. at 651.

246. *See id.*

when it held that the trial court's action "deprived the court of the only available means of exercising a sound discretion" in deciding whether to order a new trial.[247] The court held that this prejudiced the defendant's rights.[248]

The circumlocution of the Court of Appeals of Maryland in rationalizing its unquestionable reversal of the disposition of a trial court of a motion for new trial is no longer necessary.[249] The court has recognized that its past statements, that disposition of motions for a new trial are effectively unreviewable, were too broad.[250] Today, Maryland appellate courts review the disposition of a motion for a new trial under an abuse of discretion standard.[251] While this standard is a relatively heightened standard, the abuse of discretion standard is not a strict standard of review. In light of this change of heart regarding the appealability of the disposition of a new trial motion, it would seem that it is unnecessary to find deprivation of a substantial right of the aggrieved party or to assert that the subject of the appeal is the judgment the court refuses to set aside when it denies a new trial motion. Therefore, stripped of thorny procedural issues, *Kimmey* stands for the proposition that a trial judge's discretion is very narrow in deciding a motion for a new trial based on newly discovered evidence when the motion is supported by new evidence presented with due diligence which, had it been used at trial, would have produced a different result.[252]

The trial court's narrowed discretion is underscored by the only other Maryland appellate decision setting aside a trial judge's disposition of a motion for a new trial based on newly discovered evidence, *Angell v. Just*.[253] Involving a petition for determination of paternity and for child support, *Angell* concerned whether Linda Just and Roy Angell had engaged in sexual relations on a specific day in 1971 in Angell's pickup truck.[254] The petitioner "repeatedly and per-

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247. *Id.*

248. *See id.*

249. *See supra* note 242 and accompanying text.

250. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 59, 612 A.2d 1294, 1298 (1992) (noting that in the past, the court's rule of refusing to review all new trial motions was too broad).

251. *See, e.g.*, Mack v. State, 300 Md. 583, 600, 479 A.2d 1344, 1352 (1984) (noting that the standard of review for a denial of a motion for a new trial is abuse of discretion by the trial judge).

252. *See supra* notes 237-48 and accompanying text.

253. 22 Md. App. 43, 321 A.2d 830 (1974).

254. *See id.* at 44, 321 A.2d at 831-32.

sistently" testified on direct and cross-examination that the child's conception took place in the truck on that date.[255] Angell denied having sexual relations with the petitioner on the 1971 date or at any time after 1963.[256] The trial court found the petitioner to be a credible witness and declared the respondent to be father of petitioner's child.[257]

Angell subsequently filed for a rehearing,[258] arguing that he was unaware that the petitioner would testify to the parties having had intercourse in the truck on the date in question.[259] He further testified that his truck was at a repair shop on the date in question and proffered an invoice for such repairs.[260] The trial court denied the respondent's petition for rehearing, determining that the proffered evidence constituted "impeachment on a collateral matter" and, thus, was an inadequate basis upon which to grant a rehearing.[261]

As had the *Kimmey* court, the court in *Angell* acknowledged the scope of discretion of the trial court with respect to a new trial motion, noting that "[t]he action of the trial court upon such motion will not be disturbed on appeal except under the most compelling and extraordinary circumstances."[262] However, unlike *Kimmey*, the *Angell* court sought for compelling and extraordinary circumstances to overcome the trial court's exercise of its discretion.[263]

The court did not believe that the respondent's proffered evidence pertained to collateral matters.[264] The court of special appeals noted that had Just been uncertain about the date and location of conception, the proffered evidence might be collateral because such evidence would not have rebutted an inference that intercourse might have taken place between the parties at some other time and place.[265] The petitioner herself refuted this possible inference by tes-

255. *See id.* at 49, 321 A.2d at 834. The court of special appeals noted that she testified that the date was her birthday. *See id.* As to the truck, the court noted elliptically that such was "a locale about which she could not have been mistaken, given her long acquaintance with Mr. Angell and her ample opportunity for observation." *Id.*

256. *See id.*

257. *See id.* at 45-46, 321 A.2d at 832.

258. *See id.* at 46, 321 A.2d at 832.

259. *See id.*

260. *See id.*

261. *Id.* at 46, 321 A.2d at 832-33.

262. *Id.* at 47, 321 A.2d at 833.

263. *See id.*

264. *See id.*

265. *See id.* at 49, 321 A.2d at 834.

tifying that the conception occurred on a specific day and at a specific place; the evidence proffered by the respondent refuted the petitioner's only claim as to time and place of conception.[266] Because the proffered evidence would demonstrate that Just's entire story was untrue, the court regarded the evidence as material rather than collateral.[267]

The court then cited *Kimmey* for the proposition that newly discovered evidence directly contradicting material facts presented by a witness and "which, if believed, would probably require a different result," constitutes a basis for a new trial.[268] Stated thus, the rule permits the trial court to grant a new trial. The court concluded that "[u]nder the established rules or principles relating to the grant of a rehearing or new trial on the basis of newly discovered evidence," and because the proffered evidence was not cumulative or merely impeaching, Angell was entitled to a rehearing.[269] Invoking *Kimmey*, the court stated:

> [I]t would be plainly unjust to permit a verdict to stand as against a timely application for new trial, if credible evidence competent to be considered and not previously discoverable by due diligence supported the conclusion that the trier of fact was misled as to the gravamen of the case.[270]

Acknowledging the requirement that it find an abuse of discretion to reverse the trial court's disposition, the court of special appeals used the same fig leaf to mask the net effect of its action employed in *Kimmey*—it treated the denial of the rehearing as the denial of a substantial right to the respondent.[271]

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266. *See id.*

267. *See id.*

268. *Id.* at 50, 321 A.2d at 835.

269. *Id.* at 55, 321 A.2d at 837.

270. *Id.* at 55-56, 321 A.2d at 838.

271. *See id.* at 56, 321 A.2d at 838. In comparison, the appellate court in *Angell* reversed the trial court's exercise of its discretion more directly than had the *Kimmey* court. In *Kimmey*, the error of the trial court was in not receiving evidence which the court of appeals assumed would have caused the trial court to reach a different result. *See* Washington, Baltimore & Annapolis Elec. R.R. Co., v. Kimmey, 141 Md. 243, 243-48, 118 A. 648, 648-50 (1922). In *Angell*, the court of special appeals specifically found error in the denial of the motion for new trial itself. *See Angell*, 22 Md. App. at 55, 321 A.2d at 837. The court concluded that "[w]e believe that discretion cannot be characterized as sound which *improperly regards* newly discovered evidence by which its exercise should

Two other leading Maryland decisions that involve a new trial based on newly discovered evidence re-affirm the narrowness of the trial court's discretion when properly proffered evidence indicates that a mistake underlies a judgment or verdict. *Bailey v. Bailey*[272] involved a divorce based on the husband's alleged adultery.[273] At the conclusion of the trial, the circuit court noted that it would grant the wife an absolute divorce, allowing permanent alimony and counsel fees.[274] The husband petitioned the court for a rehearing to present the testimony of his alleged mistress, Madeline Moltz,[275] and evidence that he was not in Baltimore, the place of the alleged adultery, on the date that the adultery allegedly occurred.[276]

The wife's private detective and brother testified at the petition hearing that the husband engaged in intercourse with Ms. Moltz in his automobile on October 14, 1944[277] and November 2, 1944.[278] The husband offered strong testimony from a number of witnesses that his car was stuck in the mud in Frederick County on the evening of October 14, 1944 and that, owing to foggy conditions, he was not able to return to Baltimore until after the time of the alleged adultery.[279] Moltz testified that her relationship with the husband was limited to car-pooling required by wartime gasoline rationing.[280] A fellow co-worker, who also traveled with the husband to work, testified that there was no sexual relationship between the two.[281]

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have been aided." *Id.* at 56-57, 321 A.2d at 838 (emphasis added).

272. 186 Md. 76, 46 A.2d 275 (1946).

273. *See id.* at 78, 46 A.2d at 275. Although the plaintiff alleged multiple grounds for divorce, the circuit court granted an absolute divorce solely for adultery. *See id.*

274. *See id.* A decree was filed accordingly two days later. *See id.*

275. *See id.* at 78-79, 46 A.2d at 275. The husband argued that there was no allegation naming Ms. Moltz as a correspondent in the complaint. Given that there was no reason to issue a summons to her, she was not in court when the testimony was taken, and therefore, Clarence Bailey was "unable to secure her attendance at the hearing of the cause." *Id.*

276. *See id.* at 79, 46 A.2d at 275.

277. *See id.* at 82-83, 46 A.2d at 277.

278. *See id.* at 83, 46 A.2d at 277. The court characterized the detective's account of the second alleged incident as "strikingly like" his account of the first alleged incident. *See id.* at 83, 46 A.2d at 277.

279. *See id.* at 85, 46 A.2d at 278. This testimony included that of the person who accompanied him on his trip to Frederick County and members of the family who helped to extricate his automobile from the mud. *See id.*

280. *See id.* at 82, 88, 46 A.2d at 277, 280.

281. *See id.* at 88, 46 A.2d at 280.

The court viewed the testimony of the husband's witnesses as an "overwhelming contradiction" to the testimony of both the investigator and the wife's brother that her husband committed adultery on October 14.[282] As to the latter occasion in November, the court concluded, "If you cannot believe the detective and [wife's brother] on [the first] occasion, you cannot believe what they say happened on the early morning of November 2d . . . . *Falsus in uno, falsus in omnibus.*"[283]

Unlike the *Kimmey* and *Angell* courts, the *Bailey* court did not reverse a trial court disposition of a motion for a new trial.[284] Nonetheless, the court of appeals's decision in *Bailey* supports the restriction on a court's discretion when new evidence is properly proffered. Upholding the trial court's grant of a new trial, the *Bailey* court stated that the newly discovered evidence demonstrated a "reasonable possibility of innocence."[285] It is difficult to imagine that the court of appeals, confronted by evidence strongly suggesting a trial court error, would have affirmed a denial of the husband's petition.

Another case in which the Court of Appeals of Maryland affirmed a trial court's grant of a motion for a new trial based on newly discovered evidence is *Smith v. Lapidus*.[286] *Smith* indicates the appropriateness of granting a new trial if it appears that newly proffered evidence would affect the plaintiff's recovery in a new trial.[287] Unlike *Kimmey* and *Angell*, and perhaps even *Bailey*, *Smith* defers to the trial court's findings on a motion for new trial.

In *Smith*, a minor was injured in a fall from a second story porch.[288] In a suit against the landlord, the minor and his mother alleged that he fell when a defective board in the porch broke.[289] An eyewitness testified that the boy was standing outside of the railing, taking clothes off a pulley clothesline, and the clothesline pul-

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282. *See id.* at 85, 46 A.2d at 278.

283. *Id.* at 85-86, 46 A.2d at 278-79.

284. *Compare id.* at 89, 46 A.2d at 280 (affirming trial court's revocation of decree), *with* Angell v. Just, 22 Md. App. 43, 47, 57, 321 A.2d 830, 833, 838 (1974) (reversing a trial court's refusal to grant a new trial), *and* Washington, Baltimore & Annapolis Elec. R.R. Co. v. Kimmey, 141 Md. 243, 253, 118 A. 648, 652 (1922) (reversing a trial court's refusal to grant a new trial).

285. *Bailey*, 186 Md. at 89, 46 A.2d at 280.

286. 208 Md. 273, 118 A.2d 373 (1955).

287. *See id.* at 279, 118 A.2d at 376.

288. *See id.* at 276-77, 118 A.2d at 374-75.

289. *See id.* at 277, 118 A.2d at 374.

led him off the porch when his hand slipped off the railing.[290] A third person testified that the boy's mother told her that the occurrence was not the landlord's fault.[291] The mother denied making this statement.[292]

After the plaintiffs received jury verdicts, the defendant moved for a new trial.[293] In support of this motion, the defendant submitted a hospital record with a doctor's notation indicating that the mother told him the child slipped while reaching for the clothesline.[294] The defendant asserted that he did not know about the hospital record until after trial.[295] The conflict between the doctor's notation—the truth of which was supported by affidavit of the doctor—and the mother's testimony at trial led the court to conclude that the plaintiffs' verdicts were excessive and to grant a new trial.[296]

Affirming the trial court, the court of appeals noted that the error in *Kimmey* was the failure to consider newly discovered evidence, a circumstance not present here.[297] It also noted the general rule, as stated in *State ex rel. Scruggs v. Baltimore Transit Co.*,[298] is that a ruling on a motion for new trial is not appealable except where some substantial right is denied.[299]

Nevertheless, the plaintiffs asserted that they should have been given an opportunity to give testimony in opposition to the defendant's motion for new trial.[300] The court stated, however, that if on the basis of affidavits submitted by the defendant, the trial judge "entertained a reasonable doubt that justice had not been done, he was empowered to strike the judgments."[301] The court noted that the exercise by the trial court of its discretion under the circumstances entailed no more than having the cause more deliberately considered by another jury.[302] The court of appeals's description of

290. *See id.*
291. *See id.*
292. *See id.*
293. *See id.* at 278, 118 A.2d at 375.
294. *See id.*
295. *See id.* at 277, 118 A.2d at 375.
296. *See id.* at 278, 118 A.2d at 375.
297. *See id.*
298. 177 Md. 451, 9 A.2d 753 (1939).
299. *See Smith*, 208 Md. at 278-79, 118 A.2d at 375 (discussing *State ex rel. Scruggs*, 177 Md. at 454-55, 9 A.2d at 754-55).
300. *See id.* at 279, 118 A.2d at 375.
301. *Id.* at 279, 118 A.2d at 375-76.
302. *See id.* (citing Snyder v. Cearfoss, 186 Md. 360, 369, 46 A.2d 607, 611 (1946)).

the trial court's action indicated the scope of the trial court's authority:

> The trial judge seems to have assumed the truth of everything stated in the appellants' affidavits, but took the view that in any event the entry in the hospital records tended to impeach the mother's testimony. He obviously felt that the entry, if presented to another jury, might affect the verdicts, or even the amount of the verdicts. This appears to be the purport of his brief opinion. We cannot hold that this was an abuse of discretion.[303]

Whereas the prejudicial circumstances of *Kimmey* and *Angell* required reversal of the trial court, *Smith* presents the more typical scenario of a trial court's exercise of its discretion and the appellate courts' deference. The trial court in *Smith* fairly considered the evidence that indicated that the verdict was wrong and, although it was not as convincing as that in *Kimmey* and *Angell*, the trial court set aside the verdict.[304] The appellate court was unwilling to second-guess the lower court. It is unlikely that the court would have done so even if the trial court had not granted the new trial. Where the evidence does not overwhelmingly establish that a new trial is necessary—so much so that *Angell* described it as a substantial right for the movant[305]—the trial court has wide latitude in granting or denying a new trial based on newly discovered evidence.

E. Verdict Against the Weight of the Evidence

The power to grant a new trial due to a verdict against the weight of the evidence empowers a trial court to undo a jury's work.[306] Generally, striking a verdict and granting a motion for new trial does not require a determination that the jury could not legally have found the result it did because some other result was compelled as a matter of law.[307] This is particularly true when the motion is considered on the basis of either the excessiveness or in-

303. *Id.* at 279, 118 A.2d at 376.

304. *See id.* at 278, 118 A.2d at 375.

305. Angell v. Just, 22 Md. App. 43, 56, 321 A.2d 830, 838 (1974). For a discussion of *Angell*, see *supra* notes 254-71 and accompanying text.

306. *See* Snyder v. Cearfoss, 186 Md. 360, 368, 46 A.2d 607, 610 (1946) ("While it is said that the power of the trial court [to grant a motion for a new trial] should be sparingly exercised, such power is universally recognized as a necessary incident and corrective to the jury system.").

307. *See* FRIEDENTHAL ET AL., *supra* note 4, at 558.

adequacy of the damages award.[308]

The court of appeals has distinguished the circumstances in which the verdict is against the evidence and in which it is against the *weight* of the evidence. Overturning a jury verdict against the evidence involves an analysis of the legal sufficiency of the evidence.[309] If the evidence is insufficient to generate an issue of fact for the jury, the trial court may simply grant a motion for judgment or a motion for judgment notwithstanding the verdict, if it allows the jury to deliberate at all.[310] Maryland's appellate courts require trial judges to submit a case to the jury if there is any evidence, "however slight," that would support the opponent of a motion for judgment.[311] Even though a slight quantum of evidence tending to create an issue of fact requires the trial court to submit the case to the jury, the trial court nonetheless has broad authority to set aside a result that it does not believe is warranted by the evidence.[312]

How broad is this authority in Maryland? A leading treatise described the broadest view of the trial court's authority as the power to act as the "thirteenth juror"—the power to set aside the verdict if there is "any evidence which would support a judgment in favor of the [moving party]."[313] A somewhat more restrictive "federal test" was described in the same treatise[314] as epitomized by the following quotation:

> On . . . [a motion for new trial] it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a

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308. *See* JAMES ET AL., *supra* note 22, at 394.

309. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 60, 612 A.2d 1294, 1299 (1992).

310. *See* MD. R. CIV. P. 2-519; MD. R. CIV. P. 2-532.

311. Mallard v. Earl, 106 Md. App. 449, 456, 665 A.2d 287, 290 (1995); *see also* Myers v. Bright, 327 Md. 395, 399, 609 A.2d 1182, 1183 (1992) ("'If there be any evidence, however slight, legally sufficient as tending to prove negligence, . . . the weight and value of such evidence will be left to the jury.'"(quoting Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549, 554 (1965))).

312. *See Buck*, 328 Md. at 60-61, 612 A.2d at 1299; *see also* FRIEDENTHAL ET AL., *supra* note 4, at 558.

313. JAMES ET AL., *supra* note 22, § 7.28, at 392-93.

314. *See id.* at 393.

verdict.[315]

Maryland has not embraced the "thirteenth juror" standard.[316] A trial court may not set aside a verdict simply because it might have reached a different result.[317] On the other hand, Maryland case law indicates that state appellate courts have never reversed a trial court's disposition of a motion for new trial based on the contention that a verdict was against the weight of the evidence. This practice has held firm in cases involving both denial and granting of new trials. The pattern of decisions demonstrates a broader scope of discretion in a trial court than the "federal test" noted above, a scope limited by vaguely expressed concerns for the effect of the new trial motion on the right to trial by jury. To be fair, however, the pattern of decisions demonstrates a tendency on the part of trial judges themselves to respect the fact-finding role of the jury. In the few leading cases that have involved the granting of a motion for new trial, however, the appellate courts have deferred to the trial court's exercise of wide discretion.

The reported decisions involving trial court dispositions of motions for a new trial usually involve a challenge to the size of the verdict rather than the legal sufficiency of the evidence. The court of appeals has clearly stated its unwillingness to second-guess a trial court as to the appropriateness of the size of a verdict:

> It is axiomatic that whether a new trial should be granted because of the inadequacy or excessiveness of a verdict lies in the sound discretion of the trial judge. In a long line of cases, this Court has unswervingly refused to disturb the exercise of the trial judge's discretion in denying a motion for new trial on those grounds.[318]

Generally, in assessing the propriety of a trial court's disposition of a motion for new trial the appellate courts are concerned only that the trial court properly exercised its discretion—that it fully considered the contention of the party aggrieved by the court's disposition.[319]

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315. Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941).

316. *In re* Petition for Writ of Prohibition, 312 Md. 280, 326, 539 A.2d 664, 686 (1988).

317. *See id.* at 321, 539 A.2d at 684.

318. Greenstein v. Meister, 279 Md. 275, 295, 368 A.2d 451, 463 (1977).

319. *See* Grabner v. Battle, 256 Md. 514, 519, 260 A.2d 634, 636 (1970) (holding that the trial court did not abuse its discretion in denying appellant's motion

On several occasions, the appellate courts have affirmed a trial court's denial of a motion for a new trial in the face of verdicts that manifested palpable anomalies. For example, in *Kirkpatrick v. Zimmerman*,[320] a plaintiff who had suffered severe injuries[321] and who had required medical services at a military hospital valued at $3,100, won a verdict of only $2,500.[322] The trial court refused to set aside the verdict as inadequate.[323] Such an award obviously provided no recovery for pain and suffering, a compensable item on a finding of liability.[324] The appellate court noted that the jury verdict may have reflected that the plaintiff did not pay for the medical care at the military hospital.[325] The court concluded:

> The hard fact is that after having heard all of the evidence and upon receipt of proper instructions from the court, the jury made its findings. It was within the sound discretion of the lower court to determine whether a new trial was justified. In the exercise of that discretion it ruled that it was not, and we have no intention of disturbing that decision.[326]

In *Grabner v. Battle*,[327] the trial court denied a plaintiff's motion for a new trial when the jury awarded recovery for property damage and medical expenses, but not for personal injuries or pain and suffering arising from an automobile accident.[328] The plaintiff struck her nose on the steering wheel during the collision with the defendant's automobile and underwent a complete nasal reconstruction and submucous resection.[329] With respect to the jury's dis-

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for a new trial); *cf.* Washington, Baltimore & Annapolis R.R. Co. v. Kimmey, 141 Md. 243, 250, 118 A. 648, 650-51 (1922) (holding that the trial court's peremptory dismissal of the motion for a new trial constituted an abuse of discretion).

320. 257 Md. 215, 262 A.2d 531 (1970).

321. *See id.* at 216, 262 A.2d at 531. The appellate court went so far as to concede the severity of the injuries. *See id.*

322. *See id.*

323. *See id.*

324. *See* Bannon v. Baltimore & Ohio R.R., 24 Md. 108, 123 (1866).

325. *See Kirkpatrick*, 257 Md. at 216-17, 262 A.2d at 531-32; Leizear v. Butler, 226 Md. 171, 175, 172 A.2d 518, 520 (1961) (holding that the lower court correctly ruled that the plaintiff's damages should not be reduced because he was paid his salary by his employer during the period of his disability).

326. *Kirkpatrick*, 257 Md. at 217, 262 A.2d at 532.

327. 256 Md. 514, 260 A.2d 634 (1970).

328. *See id.* at 519, 260 A.2d at 636.

329. *See id.* at 515, 260 A.2d at 634.

regard for the suffering that must have attended such an injury, the court observed: "They might well have directed their attention to the elements of personal injury and pain and suffering and found them inconsequential."[330]

The *Grabner* court also addressed the issue of whether a jury may be permitted to limit a plaintiff's recovery to out-of-pocket losses or "specials."[331] The court turned to *Leizear v. Butler*,[332] which also considered a verdict that obviously made a very low award for pain and suffering.[333] Refusing to overturn the trial court's denial of a new trial in *Leizear*, the court emphasized the jury's prerogative to determine damages except when "a clear wrong or injustice is shown,"[334] and the trial court has the prerogative to set it aside or let it stand.[335] Therefore, the *Grabner* court concluded that the jury's verdict was proper and affirmed the trial court's denial of Grabner's motion for a new trial.[336]

The *Grabner* and *Leizear* courts' refusal to overturn jury verdicts that did not compensate for pain and suffering that had been patently sustained, and that were less than the expenses incurred by the victims demonstrates a strong respect for the jury's fact-finding role. Even greater respect is accorded to the trial court's evaluation

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330. *Id.* at 517, 260 A.2d at 635. The issue of personal injury and pain and suffering was muddied by the fact that the plaintiff suffered a similar injury three years after the occurrence at issue, but before trial. *See id.* at 515, 260 A.2d at 634. While the jurors were instructed to disregard the effects of the second injury, it is possible that they did not do so. *See id.* at 516, 260 A.2d at 635. The willingness to allow juries to determine whether to compensate victims for their injuries was demonstrated starkly in *Shapiro v. Chapman*, 70 Md. App. 307, 520 A.2d 1330 (1987). Here, patients at a state mental facility sued under federal civil rights law, 42 U.S.C. § 1983 (1982), and state law to recover for physical abuse inflicted by Barry Chapman, one of their caretakers. *See Shapiro*, 70 Md. App. at 311, 520 A.2d at 1332. The jury awarded $1.00 each to the plaintiffs in damages and the trial court denied the plaintiffs' motion for a new trial. *See id.* at 310, 520 A.2d at 1331. The appellate court stated: "The jury found that Chapman willfully and maliciously assaulted appellants, but it apparently did not believe that appellants sustained any significant injuries. These findings were certainly within the jury's prerogative." *Id.* at 318, 520 A.2d at 1335. The court held that the denial of a motion for a new trial by the appellate court was not an abuse of discretion. *See id.* at 319, 520 A.2d at 1336.

331. *See Grabner*, 256 Md. at 518-19, 260 A.2d at 636.

332. 226 Md. 171, 172 A.2d 518 (1961).

333. *See id.* at 174-75, 172 A.2d at 519-20.

334. *Id.* at 177, 172 A.2d at 521.

335. *See id.*

336. *See Grabner*, 256 Md. at 519, 260 A.2d at 636.

of the jury's performance. Appellate courts have deferred to the trial court's judgment determining whether or not deference is due to the jury.[337]

In *Thodos v. Bland*,[338] the court of special appeals explored the outer boundaries of this deference to the jury's fact-finding role and to the trial court's judgment in letting the jury's work stand. In *Thodos*, the controversy pertained to the jury's exoneration of both co-defendants in a lawsuit to recover for injuries sustained in an automobile accident.[339] The plaintiff was injured when the automobile, in which she was a passenger, was struck while making a left turn by a vehicle traveling in the opposite direction.[340] The plaintiff sued the operators of both vehicles.[341] Although it was clear from the evidence that either the driver of the car in which plaintiff was a passenger or the driver of the other car caused the accident,[342] the jury

337. Deference to both the jury and the trial court may also be seen in instances in which the jury has allowed recovery on a basis that may be legally inappropriate. In *Brinand v. Denzik*, 226 Md. 287, 173 A.2d 203 (1961), the plaintiff's counsel exhorted the jury in closing argument to calculate damages on the assumption that the plaintiff had sustained a 10 % disability. *See id.* at 289, 173 A.2d at 204. The plaintiff's medical witness did not assign a percentage of disability. *See id.* Although the trial judge sustained defendant's objection to this argument, a tabulation sheet prepared by the jury foreman during deliberations indicated that the jury probably did as the plaintiff's lawyer had exhorted. *See id.* at 290, 173 A.2d at 205. Upholding the trial court's denial of the defendant's motion for a new trial, the court of appeals speculated that the trial court may have been influenced by the lack of an award for pain and suffering. *See id.* at 293, 173 A.2d at 206. This is remarkable because it gives the trial court leeway to compensate for one legal anomaly with another. Regarding denial of the motion for a new trial under the circumstances as an abuse of discretion, Judge Horney observed:

> As I see it, since the jury was not at liberty to take the remarks of counsel into account in arriving at the amount of its verdict, the refusal to grant the motion was an abuse of discretion in that it was improper for the lower court to ignore the undisputed fact that the jury of its own volition over the signature of its foreman, informed the clerk of the court that it had considered as evidence facts not before it.

Id. at 294-95, 173 A.2d at 207 (Horney, J., dissenting).

338. 75 Md. App. 700, 542 A.2d 1307 (1988).

339. *See id.* at 703, 542 A.2d at 1309.

340. *See id.*

341. *See id.*

342. *See id.* at 705, 542 A.2d at 1310. If the vehicle in which the plaintiff was a passenger had been turning left on a green arrow, the signal controlling traffic for the other vehicle would have been red. *See id.* If the turning vehicle did not attempt to turn until after the green arrow, then traffic in the opposite di-

found that the plaintiff did not prove by a preponderance of the evidence that either defendant was responsible for the accident.[343]

In assessing whether the trial court's denial of the plaintiff's motion for a new trial was an abuse of discretion, the court first determined whether the case involved extraordinary or compelling circumstances or denial of a substantial right.[344] In light of the defendants' near concession at oral argument that one or the other was the proximate cause of the accident[345] and the plaintiff's potential assumption of the entire cost of her loss,[346] the court saw the case as presenting extraordinary circumstances and the denial of a substantial right to the plaintiff—an opportunity for just resolution of her claim.[347]

In addressing whether the trial court's denial of plaintiff's motion for a new trial was an abuse of discretion, the court was unable to find a similar Maryland decision.[348] Decisions in two similar cases in other states[349] established that the denial of a new trial could be an abuse of discretion.[350] In those two cases, however, unlike *Thodos*, there was no specific finding that the plaintiff had not met the burden of proof as to either defendant.[351] The court of special appeals speculated that the jury so found because it could not agree which of the defendants caused the accident.[352] The court posited that the trial court's denial of the motion for a new trial effected a real injustice to the plaintiff.[353] It was lawful, however, for the jury to find that the plaintiff had not met the burden of persuasion with respect to either defendant because the question of liability was for the jury.[354] The court upheld the denial of the motion for a new trial

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rection would have been free to move through the intersection and would have had the right of way. *See id.* Testimony of a witness from the State Roads Department indicated that the lights in the intersection were functioning properly at the time of the accident. *See id.*

343. *See id.*

344. *See id.* at 707, 542 A.2d at 1311.

345. *See id.* at 709, 542 A.2d at 1312.

346. *See id.*

347. *See id.* at 709-10, 542 A.2d at 1312.

348. *See id.* at 710, 542 A.2d at 1312.

349. *See id.* at 710-12, 542 A.2d at 1312-13 (discussing Banes v. Thompson, 352 So. 2d 812 (Miss. 1977); Myers v. Gold, 419 A.2d 663 (Pa. Super. Ct. 1980)).

350. *See id.* at 710-11, 542 A.2d at 1313.

351. *See id.* at 711-12, 542 A.2d at 1313.

352. *See id.* at 717, 542 A.2d at 1316.

353. *See id.* at 713, 542 A.2d at 1313-14.

354. *See id.* at 713, 542 A.2d at 1314.

because the decision of the trial court to accept the jury's unjust, but lawful, verdict was not an abuse of discretion.[355]

In concluding, Judge Bell candidly expressed the court's unhappiness with its limited role: "Were we ruling upon appellant's new trial motion, we would have unhesitatingly granted it. Nevertheless, we are unable to rationalize a basis for finding that the trial judge abused his discretion. Accordingly and regretfully, we affirm the judgment."[356] Like the other decisions affirming the trial court's denial of a new trial motion, *Thodos* represents an appellate act of faith in both the fact-finding role of the jury and, in turn, the discretion of the trial court in evaluating the verdict.

The appellate decisions that assess the granting of motions for a new trial have focused only on the power of the trial court to assess the verdict in light of the weight of the evidence. Although the grant of a new trial motion is inherently antagonistic to the fact-finding prerogative of the jury, that has not been a critical consideration in appellate analysis of such action.

The leading case involving affirmance of the grant of a new trial motion, *Snyder v. Cearfoss*,[357] demonstrates the degree of discretion the court of appeals has bestowed on trial courts *vis à vis* the jury's fact-finding role. *Snyder* involved two suits by the administratrix of both the estates of Malinda Summers, her mother, and Mary Hughes, her aunt, against the administratrix of the estate of Jesse O. Snyder (Jesse).[358] Jesse was the draftsman and principal beneficiary of the will of Abraham Snyder (Abraham), who died in 1922.[359] Abraham was the brother of Summers and Hughes.[360]

The suit alleged that Jesse persuaded Summers and Hughes not to contest probate of Abraham's will, which left most of Abraham's estate to Jesse, by promising that he would give them each one third of the amount he received from Abraham's estate.[361] Hughes died in 1932, Summers died in 1933, and Jesse died in 1941.[362] The case was asserted to have been brought within the statute of limitations on the basis of an alleged oral acknowledgment in 1940 by

355. *See id.* at 712, 542 A.2d at 1313.
356. *Id.* at 717, 542 A.2d at 1316.
357. 186 Md. 360, 46 A.2d 607 (1946).
358. *See id.* at 361-62, 46 A.2d at 607.
359. *See id.* at 362, 46 A.2d at 607.
360. *See id.*
361. *See id.* at 362, 46 A.2d at 607-08.
362. *See id.* at 363, 46 A.2d at 608.

Jesse of his obligation to Hughes and Summers.[363] The trial court denied the parties' motions for directed verdict, and the jury returned verdicts of $28,521.93 in favor of each estate.[364] The trial court denied the defendant's motion for judgment notwithstanding the verdict but granted a new trial as to both verdicts.[365]

The quarrel with the jury's verdicts was not with the amount of the awards, but rather with the findings of liability.[366] It is clear from the explanation of the three circuit court judges who disposed of the new trial motion that they were unhappy that they had to let the jury decide the case. Moreover, they were not going to sustain plaintiffs' verdicts on just enough evidence to get the cases to a jury:

> [U]nder our system here in Maryland, if there is more than a scintilla of evidence, and giving consideration to all the evidence and all the inferences properly deducible from it you find there is more than a scintilla of evidence, you have to let the jury pass on it . . . . But the evidence is not satisfactory to us; it is unconvincing. The total effect of it is to set aside a will that was some forty years old. We feel that there ought to be clear and satisfactory evidence to sustain that kind of a case.[367]

This statement is remarkable in that it appears to call for a higher standard of proof than preponderance of the evidence for cases seeking to disturb ancient probate matters. Requirement of such a standard in such cases is essentially a legislative determination. Such a determination may be made as a matter of common law;[368] if such were made the law, a plaintiff's case would not be submitted to a jury unless it could reasonably find that the evidence meets the higher standard. The trial court in *Snyder* essentially imposed this requirement at the back end, by setting aside the jury

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363. *See id.* at 363-64, 46 A.2d at 608.

364. *See id.* at 365, 46 A.2d at 609.

365. *See id.*

366. *See id.* at 366, 46 A.2d at 609.

367. *Id.* The court of appeals accordingly dismissed the plaintiff's appeal, refusing to substitute its judgment as to the weight of the evidence for that of the trial court. *See id.* at 369, 46 A.2d at 611.

368. For example, in an action for deceit, fraud must be proven by clear and convincing evidence. *See* Gross v. Sussex, Inc., 332 Md. 247, 257-58, 630 A.2d 1156, 1161 (1993).

verdict because the jury did not apply a higher standard.[369] Assuming that the same standard is applied on a retrial, plaintiffs' verdicts are vulnerable to attack unless the plaintiffs offer stronger evidence of the agreements among the decedents than they did in the first trial. That is not something that should be determined on a motion for new trial, however, but rather on a motion for judgment under Maryland Rule 2-519.[370]

Since the trial court had *granted* the motion for new trial, an interlocutory order, the case was not properly before the court of appeals and it dismissed the appeal on that basis.[371] The court considered at some length, however, the power of the trial court to grant a new trial.[372] Although the court cautioned that the power of a trial court to set aside a verdict on the grounds that it is against the evidence should be used sparingly,[373] it quoted from a leading nineteenth century treatise about the power of the trial court with respect to the jury findings: "'It is settled, then, that the court which tried the cause, may, in a proper case, of which it shall be the judge, set aside the verdict and grant a new trial, under circumstances which at first blush would seem to trench upon the rights of the jury.'"[374] The court stated further:

> We cannot substitute our judgment as to the weight of the evidence for that of the trial court. If the evidence is not satisfactory to the trial court, it is within its province to order a new trial before another jury. Whether there is any limit to the number of times a trial court may override a jury's verdict is a question upon which we need not pass at this time.[375]

Such a scope of authority is a matter of constitutional concern, particularly when the dispute about the verdict pertains to liability *vel non* rather than the amount of damages. In *Snyder*, the trial

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369. *See Snyder*, 186 Md. at 365-66, 46 A.2d at 609.

370. On retrial, directed verdicts were granted in favor of the defendant but were reversed on appeal. *See* Snyder v. Cearfoss, 187 Md. 635, 644, 51 A.2d 264, 268 (1947). It does not appear that the court of appeals imposed the higher standard of proof on the plaintiff than it had earlier appeared to endorse. *See id.*; *see also supra* notes 366-69 and accompanying text.

371. *See Snyder*, 186 Md. 366-67, 46 A.2d at 609-10.

372. *See id.* at 368-69, 46 A.2d at 610-11.

373. *See id.* at 368, 46 A.2d at 610.

374. *Id.* at 369, 45 A.2d at 611 (quoting DAVID GRAHAM & THOMAS W. WATERMAN, NEW TRIALS 1212 (1855)).

375. *Id.*

court insisted on a particular result, even when the evidence was such that the choice among possible results resided with the jury.[376] If a trial court intends to impose a higher standard of proof as to a particular cause of action, it should do so as part of its function in stating the law to the jury[377] rather than by stretching its power to evaluate the verdict in light of the evidence.

The discretion of the trial court to set aside a verdict based on an excessive amount of damages, rather than on the issue of liability, appears to entail less tension with the jury's constitutional fact-finding role; rather, it is a broad power. This may be seen in *Conklin v. Schillinger*.[378] In that case, the plaintiff was injured when the defendant, driving on the wrong side of the road at forty miles per hour because he was too impatient to move with the heavy traffic in his own lane, collided head-on into the vehicle in which plaintiff was a passenger.[379] The plaintiff suffered facial lacerations, profuse bleeding, permanent disfigurement, an injury to her cervical spine, a broken arm and finger, and ruptured ligaments in her knee.[380] The jury awarded the plaintiff a verdict on these injuries of $100,000.[381] The trial court granted a new trial as to that part of the award on the basis that it was "so excessive as to shock the conscience of the [c]ourt."[382]

The plaintiff asserted a constitutional argument that the trial court had no authority to set aside the verdict based on excessiveness of the verdict.[383] Making a detailed review of English authorities, the court concluded:

> [W]e are of the opinion that the majority of the English decisions prior to the adoption of the Maryland Constitution of 1776 indicated that *power* existed to grant new trials in tort cases upon the sole ground of a jury verdict for excessive damages and this opinion is confirmed by the English decisions rendered during the 20-year period following 1776.[384]

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376. *See id.* at 366, 46 A.2d at 609.
377. *See* Singleton v. Roman, 195 Md. 241, 246, 72 A.2d 705, 707 (1950).
378. 255 Md. 50, 257 A.2d 187 (1969).
379. *See id.* at 54-55, 257 A.2d at 189-90.
380. *See id.* at 55-56, 257 A.2d at 190.
381. *See id.* at 53, 257 A.2d at 189.
382. *Id.*
383. *See id.* at 58, 257 A.2d at 191.
384. *Id.* at 64, 257 A.2d at 194.

The court noted that it had sustained the practice of the trial court granting a new trial unless the plaintiff remitted the portion of the verdict deemed by the trial court to be excessive.[385] The court noted that it is for the trial judge to determine whether a verdict "shock[s] his conscience,"[386] but, making its own review of the evidence,[387] it concluded that the trial court did not abuse its discretion in granting the new trial.[388]

The notion that a trial court may set aside a judgment that shocks its conscience is well established in Maryland law.[389] It should at least be noted, however, that when a trial court delves into matters of conscience, it assumes a role that is the *raison d' être* of the jury.[390] The tendency of jurors to be passionate needs to be controlled, but the court must recognize that a jury will also consult their conscience and common sense in their decisions, before it sets aside a verdict. Increasingly, the lower federal courts and some state courts are reassessing the scope of the trial court's discretion concerning a new trial in order to accord proper respect to the jury's fact-finding role.[391]

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385. *See id.*

386. *Id.* at 69, 257 A.2d at 197 (citing Safeway Trails, Inc. v. Smith, 222 Md. 206, 223, 159 A.2d 823, 833 (1960)).

387. *See id.* at 70, 257 A.2d at 197. Noting that the plaintiff was painfully injured, the court stated "fortunately most of her injuries responded to treatment and did not result in extensive permanent injury." *Id.* The court of appeals's language sounds a great deal like the deliberations of a jury. *See id.* at 69-70, 257 A.2d at 197.

388. *See id.*

389. *See, e.g., Safeway Trails*, 222 Md. at 223, 159 A.2d at 833 (holding that it is for the trial judge to determine whether the verdict shocked his conscience so that remittitur was permissible); ACandS v. Abate, 121 Md. App. 590, 692, 710 A.2d 944, 994 (1998) (stating that the test for remittitur is not the amount of the verdicts, but "whether it shocks the conscience of the court"); Alexander v. Evander, 88 Md. App. 672, 716, 596 A.2d 687, 709 (1991) (holding that the standard to be applied by the trial judge in ordering a new trial is whether the verdict shocks the conscience).

390. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 343 (1979) (Rehnquist, J., dissenting) (stating why the framers of the Bill of Rights included a civil jury trial right: "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the passional elements in our nature, and thus keep the administration of law in accord with the wishes and feelings of the community." (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 238 (1920)(internal quotation marks omitted))).

391. *See infra* Part IV.

III. MARYLAND'S EVOLVING RIGHT TO JURY TRIAL

A. Adaptation of Federal and Maryland Jury Trial Right to the Merger of Law and Equity

The civil jury trial provisions of the Maryland Constitution preserve a right to a jury trial that had existed since the adoption of the United States Constitution.[392] Historically, the determination of the right to trial by jury depended upon law and equity as it existed at the time of the creation of the constitutional right. Jury trials were unavailable in actions filed on the equity side of the court, and equitable relief was not granted in actions at law.[393] Although the separation of law and equity jurisdiction was quite carefully maintained in Maryland practice,[394] legal claims sometimes found their way onto the equity side of the court and were thus decided without a right to a jury trial.[395]

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392. Several provisions of Articles five, twenty, and twenty-three of the Maryland Declaration of Rights have been construed as embodying different entitlements for the determination of a common law jury trial right. *See* MD. CONST., DECL. OF RIGHTS arts. 5, 20, 23; *see also* Kann v. Kann, 344 Md. 689, 703, 690 A.2d 509, 516 (1997) (finding that the law prior to 1851 did not bestow a right to jury trial with respect to trust and estates, with certain exceptions); Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 503, 158 A.2d 125, 130 (1960) (recognizing that the practices of remittitur and of granting a new trial were present when the Maryland Constitution was adopted). Although there is not an absolute right to a jury trial in all actions, this ambiguity had no effect on the power of the trial judge to grant a new trial. *See Turner*, 221 Md. at 503, 158 A.2d at 130.

393. *See* Higgins v. Barnes, 310 Md. 532, 540, 530 A.2d 724, 728 (1987) (noting that prior to 1984, civil actions were required to be filed as either law or equity actions).

394. *See, e.g., id.* (acknowledging that the historical separation of law and equity had been "scrupulously maintained"); Creamer v. Helferstay, 294 Md. 107, 113, 448 A.2d 332, 335 (1982) (noting the procedural distinctions between actions at law and suits at equity and that many county circuit courts maintained separate law and equity dockets before the merger of law and equity). For examples of exceptional situations where a jury trial was provided in equity proceedings, and where courts of law were able to exercise equitable powers, see *Higgins*, 310 Md. at 540 n.2, 530 A.2d at 728 n.2.

395. *See Higgins*, 310 Md. at 540-41, 530 A.2d at 728 (noting that the doctrine of equitable "clean-up" allowed a chancellor in equity to decide both legal and equitable issues that ended up in equity court by "claim, counterclaim, cross-claim or third-party action"). Equitable jurisdiction of a matter, which existed at the time of filing, was not destroyed merely because an adequate remedy at law became available. *See* American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937). In its sound discretion, the court may suspend the suits in equity until

In 1984, a major revision of the Maryland Rules included Rule 2-301 which provides: "There shall be one form of action known as "civil action.'"[396] The new rule merged law and equity into one type of claim, without the former distinctions and without affecting the right to a jury trial.[397] Before merger, one could not invoke the powers of an equity tribunal without a showing that a remedy at law would be inadequate.[398] After the merger, any claim arising in a circuit court comes before a judge possessing equitable powers and broad discretion to employ such powers. The judge's equitable powers include the right to consolidate actions, enter joint or separate verdicts, and the right to order separate trials for multiple claims.[399]

The power to control the order of claims, when combined with an unprecedented mixture of legal and equitable claims in the same action, posed a serious threat to trial by jury. Unless a trial judge allowed legal claims triable by jury to be tried first, such claims would effectively be resolved by the trial court's adjudication of the equitable claims, thereby depriving legal claims of the right to jury trial.[400]

In *Higgins v. Barnes*,[401] the Court of Appeals of Maryland addressed the issue of whether a party loses the right to a jury trial on legal issues simply because they are raised in an equitable action. This case allowed the court to determine the scope of the right to jury trial in the wake of the merger of law and equity.[402] Broader policy implications of *Higgins* may also shed light on the relationship between the right to a jury trial and the trial court's power to

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other legal claims are disposed or vice versa. *See id.* at 215-16. Whether a chancellor consolidated legal and equitable claims in one action or the chancellor enjoined prosecution of a related but separate action was left to the chancellor's discretion. *See id.*

396. MD. R. CIV. P. 2-301.

397. *See* Rees, *supra* note 5, at 304 n.1.

398. *See, e.g.*, Brumbaugh v. Schnebly, 2 Md. 320, 325 (1852).

399. *See* MD. R. CIV. P. 2-503.

400. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959) (reversing the court of appeals's holding that it was not an abuse of discretion to try the equitable cause first, even though it might prevent a full jury trial of the other legal claims).

401. 310 Md. 532, 551, 530 A.2d 724, 733 (1987) (explaining that compelling a defendant to raise legal counterclaims in an equity-based action may unconstitutionally deprive him of a jury trial).

402. *See id.* (finding a constitutional requirement to "inviolably preserve" the right to trial by jury in actions at law).

grant a new trial.[403]

In *Higgins*, the plaintiff made a contract with the Barneses to transfer an improved lot subject to a mortgage so long as the Barneses assumed this mortgage.[404] The Barneses, in turn, were to convey two unimproved lots to Higgins, on which they were to construct a home for Higgins.[405] Higgins agreed to give a mortgage on the property to the Barneses, representing the difference between the value of the property she conveyed and that of the property conveyed to her, plus the costs of construction of the structure.[406]

Unhappy with the construction, Higgins declined to execute the mortgage, claiming a credit for construction defects.[407] The Barneses sued Higgins for specific performance of the contract to execute a mortgage, seeking damages in the alternative.[408] Higgins counterclaimed for breach of contract and demanded a jury trial.[409] The trial court granted the Barneses' motion to strike the jury demand on the basis that the merger of law and equity had no effect on the right to trial by jury.[410] Higgins appealed to the Court of Special Appeals of Maryland, but the court of appeals granted certiorari before consideration of the case by the intermediate appellate court.[411]

The court of appeals stated squarely the issue posed by Ms. Higgins's jury demand as to her counterclaim:

> Now that the merger of law and equity has been accomplished, and parties may join legal and equitable claims in a single civil action to be decided by a court no longer divided into law and equity sides, this Court must determine the impact the rules change shall have upon the availability of trial by jury.[412]

For guidance, the court turned to federal court decisions that had already grappled with the question of what protection was required for jury trial of legal claims combined in the same action

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403. *See id.*
404. *See id.* at 534, 530 A.2d at 725.
405. *See id.*
406. *See id.* at 535, 530 A.2d at 725.
407. *See id.*
408. *See id.* at 535, 553, 530 A.2d at 725, 737.
409. *See id.* at 535, 530 A.2d at 725.
410. *See id.* at 536, 530 A.2d at 726.
411. *See id.*
412. *Id.* at 541, 530 A.2d at 728.

with equitable claims.[413] The essentially identical language of Federal Rule 3 and Maryland Rule 2-301 – the rules that effected the merger of law and equity in the federal and Maryland courts respectively – also motivated the court's decision to consult federal law.[414] The court further considered how the Supreme Court assessed the effect of the federal rules on the right to trial by jury to determine how the similar Maryland rule should affect the right to trial by jury.[415]

The court looked primarily to *Beacon Theatres v. Westover*,[416] which was the Supreme Court's first decision addressing the effects of the merger of law and equity on the right to jury trial under the Seventh Amendment.[417] The Court in *Beacon Theatres* adopted a rule which so protected the right to a jury trial that it has been contended that the court expanded, rather than preserved, the right as it existed in 1791.[418]

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413. *See id.* at 543-47, 530 A.2d at 729-31; *see also, e.g.*, Myers v. United States Dist. Court, 620 F.2d 741 (9th Cir. 1980); Eldredge v. Gourley, 505 F.2d 769 (3d Cir. 1974); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961).

414. *See Higgins*, 310 Md. at 543, 530 A.2d at 729.

415. *See id.* The court noted that reliance by the Maryland courts on federal decisions to construe analogous Maryland rules is traditional. *See id.* Although construction of a constitutional right was as much at issue in *Higgins* as construction of a Maryland rule, the court did not, at least explicitly, look to federal case law construing the scope of the federal constitutional guarantee itself. *See id.* The Maryland courts assess the scope of the right to trial by jury in light of the right that existed in Maryland at the time of the adoption of the Maryland Constitution because the Seventh Amendment of the United States Constitution is not applicable to the states. *See, e.g.*, Knee v. City Passenger Ry. Co., 87 Md. 623, 40 A. 890 (1898) (explaining that it is the historical trial by jury as it existed when the Constitution of the United States was first adopted to which individuals are entitled); *see also* Bringe v. Collins, 274 Md. 338, 335 A.2d 670 (1974) (holding that Maryland courts do not turn to the Seventh Amendment to assess the scope of this right).

416. 359 U.S. 500 (1959).

417. *See Higgins*, 310 Md. at 543-44, 530 A.2d at 729-30.

418. *See Beacon Theatres*, 359 U.S. at 510. Indeed, Justice Stewart addressed this expansion in his dissent. *See id.* at 518 (Stewart, J., dissenting); *see also* John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 16 U. PA. L. REV. 1, 13 (1967). The court of appeals noted that decisions of courts in other states that have consummated the merger of law and equity revealed "a variety of approaches and philosophies ranging from a jealous protection of the right to jury trial to a preference for the 'efficiency' of having a judge determine all issues in any case involving a legitimate equitable claim," and finally, a "middle ground" of opinions which

The facts of *Beacon Theatres* bore significant resemblance to those of *Higgins*. Fox West Coast Theatres, Inc. operated a cinema in San Bernardino, California and had contracts with movie distributors for clearance—"a period of time in which no other theatre [could] exhibit the same pictures."[419] Beacon built a drive-in theater eleven miles from San Bernardino and notified Fox that it believed the clearances were "overt acts in violation of the antitrust laws."[420]

Fox sued for a declaratory judgment, alleging that the notification, as well as threatened lawsuits and treble damages amounted to "duress and coercion," depriving it of its right to negotiate for exclusive first-run contracts.[421] It sought a declaration that the clearances were reasonable and not in violation of antitrust laws.[422] Fox also sought an injunction pending final resolution of the suit preventing Beacon from instituting any action against Fox or its distributors under the antitrust laws.[423] Beacon answered with a counterclaim,[424] alleging that the clearances represented a conspiracy between Fox and its distributors to restrain trade and monopolize first-run pictures in violation of the antitrust laws.[425] Beacon demanded a trial by jury.[426]

Believing the issues to be essentially equitable, the trial court determined that it would first decide the issues grounded in equity, including some common to the counterclaim for damages.[427] Beacon sought review of the determination by mandamus and the Ninth Circuit affirmed the trial court.[428] Explaining that the Fox complaint had established a valid claim for injunctive relief, the United States Court of Appeals for the Ninth Circuit concluded that the claim was cognizable in equity.[429] Rejecting Beacon's contention

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determined the right to jury trial depending on whether the issues in the case are predominantly legal or equitable in nature. *See Higgins*, 310 Md. at 541, 530 A.2d at 728. In short, not all states protect the right to jury trial to the extent of the Supreme Court.

419. *Beacon Theatres*, 359 U.S. at 502.

420. *Id.*

421. *Id.* (internal quotation marks omitted).

422. *See id.* at 502-03.

423. *See id.* at 503.

424. *See id.*

425. *See id.*

426. *See id.*

427. *See id.*

428. *See* Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).

429. *See id.* at 873. The court of appeals opined that the effects and damages of the defendant's threats would be difficult to ascertain. *See id.*

that an adequate legal remedy had become available to the plaintiff through an opportunity to defend the counterclaim, the court instead focused on the timing of Fox's suit: it had no means to establish the invalidity of the defendant's threats at that time.[430] The intermediate appellate court held that once equitable jurisdiction attached, it was not destroyed simply because a legal remedy had become available.[431] The court noted that, as before the adoption of the Federal Rules of Civil Procedure, the question as to whether legal or equitable actions "should be tried first remains primarily within the discretion of the trial judge and is for the determination of that judge after consideration of various factors of fairness and convenience."[432]

The United States Circuit Court for the Ninth Circuit recognized that if the district court had exercised its discretion and adjudicated the plaintiff's claim first, without a jury, there would be no opportunity to adjudicate issues common to the plaintiff's and defendant's claims before a jury.[433] Nonetheless, the court deemed this to be appropriate in light of the district court's characterization of the basic issues in the suit as equitable.[434]

On certiorari, the Supreme Court did not dispute that Fox's complaint could be construed "as alleging the kind of harassment by a multiplicity of lawsuits which would *traditionally* have justified equity to take jurisdiction and settle the case in one suit."[435] The Court did not explicitly reject the assumption of the Ninth Circuit that when equity was properly invoked, the chancellor could determine the order of trial of claims in the action.[436] Yet, the Supreme Court held that a trial court may not deprive a party of jury trial on a counterclaim triable by jury by exercising its discretion to try first the plaintiff's equitable claim.[437]

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430. *See id.*

431. *See id.* (relying on American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937)).

432. *Id.* at 875-76.

433. *See id.* at 876.

434. *See id.* at 877-78.

435. Beacon Theatres v. Westover, 359 U.S. 500, 506 (1959)(footnote omitted).

436. *See id.* at 505. It did note, however, that *American Life Insurance v. Stewart*, 300 U.S. 203 (1967), was decided *before* the adoption of the Federal Rules of Civil Procedure. *See Beacon Theatres*, 359 U.S. at 505. In dissent, Justice Stewart accused the Court of denigrating *American Life* as a "precedent[ ] decided under discarded procedures." *Id.* at 518 (Stewart, J., dissenting).

437. *See Beacon Theatres*, 359 U.S. at 510-11 ("[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal

It was to this holding that the court in *Higgins*[438] looked to decide that the Barneses, by winning the race to the courthouse and suing in equity, could not deprive Higgins of her right to jury on her counterclaim in contract. The *Higgins* court discussed *Beacon Theatres* and other federal precedents at some length, concluding:

> In the federal courts, then, the entitlement to jury trial is not determined simply by the characterization of the action as a whole as legal or equitable. If an asserted counterclaim presents a legal claim historically accorded the right to jury trial and raises factual issues in common with the plaintiff's equitable claim, the defendant is ordinarily entitled to a jury determination of those factual legal issues. *Beacon Theatres* and its progeny speak of some narrow discretion of a trial court to deny a jury trial in "the most imperative circumstances," but the lower Federal courts have seldom recognized such circumstances.[439]

Later in the opinion, the *Higgins* court indicated that its holding went beyond protecting the right to trial by jury of counterclaimants:

> We are constitutionally required to "inviolably preserve" the right of trial by jury in actions at law, and so "where both legal and equitable issues are presented in a single case, 'only under [the] most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'"[440]

Beacon Theatres removed a potential impediment to trial by jury that existed in 1791 by restricting the trial judge's discretion to first adjudicate equitable claims that effectively adjudicated one's legal claims

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issues be lost through prior determination of equity claims.").

438. 310 Md. 532, 530 A.2d 724 (1987).

439. *Id.* at 547, 530 A.2d at 731 (footnote omitted).

440. *Id.* at 551, 530 A.2d at 733 (quoting Dairy Queen v. Wood, 369 U.S. 469, 472-73 (1962)). The *Higgins* rule is not limited to discrete legal *claims*, as opposed to *issues*, when combined with equitable claims or issues. *See id.* at 535 n.1, 530 A.2d at 725 n.1. As concluded by the Court of Appeals of Maryland:

> [O]ur concern is with the nature of the *issues* legitimately raised by the pleadings, and not with the labels given to the pleadings. The legal issues in this case were identified by Higgins' particularlized answer to the complaint, and our decision does not turn on the fact that a counterclaim was filed.

Id.

as well. Whereas the Seventh Amendment simply preserves trial by jury as it existed in 1791, one might argue that *Beacon Theatres* protected trial by jury to a degree beyond that required by the Constitution by reducing the equitable chancellor's power over the order of a trial.[441] In essence, *Beacon Theatres* expanded the jury trial right beyond its historical boundaries.

The power of the chancellor to control the order of trial of related cases existed in Maryland as well.[442] Indeed, it was implicitly exercised by the trial judge in *Higgins*.[443] It appears that sweeping away this power of the chancellor to determine the order of claims expanded, rather than preserved, the right to jury trial.

The *Beacon Theatres* Court was not unmindful of this point. The Seventh Amendment requires trial by jury "in suits at common law."[444] This latter phrase has long established a dividing line—for purposes of trial by jury—between actions at law and those in equity, admiralty, and maritime jurisprudence.[445] The Court in *Beacon Theatres* observed that "the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity."[446] The Court retains its fidelity to a historic notion of the scope of trial by jury but, in reality, views history as requiring only a demarcation between law and equity, with the latter subject to shrinkage with the march of procedu-

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441. *See Beacon Theatres*, 359 U.S. at 510 (stating that the jury trial must occur first if the equitable claim infringes on one's right to trial by jury for legal cases). Under the Federal Rules of Civil Procedure, a trial court has discretion to order separate trials of claims in an action. *See* FED. R. CIV. P. 42(b). Prior to the adoption of the federal rules and the Declaratory Judgment Act, equity courts possessed essentially the same power; however, in an unmerged system, it took the form of an ability to stay either matters within its own jurisdiction or, since it could act in personam, related matters in a law court. *See Beacon Theatres*, 359 U.S. at 507. For a discussion of the impact of the Declaratory Judgment Act, see *infra* notes 450-53 and accompanying text.

442. *See Higgins*, 310 Md. at 540-41, 530 A.2d at 728.

443. In *Higgins*, after one judge struck Higgins' jury demand on the basis that "the merger of law and equity had no effect on the right to trial by jury," a second judge tried the Barnes' specific performance claim first. *Id.* at 536, 530 A.2d at 726. In the course of the second trial, the judge gave Ms. Higgins a credit for construction defects; therefore, there was no need for a trial by jury of her counterclaim. *See id.*

444. U.S. CONST. amend. VII.

445. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

446. *Beacon Theatres*, 359 U.S. at 509. For a discussion of the Declaratory Judgment Act, see *infra* notes 450-53 and accompanying text.

ral innovations.[447]

In *Beacon Theatres*, the plaintiff, Fox, sued in equity because it had no other way to deal with Beacon's threats, which Fox believed were based on an erroneous understanding of the antitrust laws.[448] Otherwise, Fox could not defend because Beacon had not sued. Before merger, Fox might have obtained the assistance of equity in restraining such threats.[449] With the Declaratory Judgment Act[450] available in modern federal practice, Fox did not have to wait to be sued to have a court determine the propriety of Fox's clearances under the antitrust laws.[451] Further, in the event that Fox might suffer damage to its business pendente lite,[452] the federal district court, possessing equitable power in a merged system, might have entered a preliminary injunction against Beacon's threats.[453] When Beacon interposed a counterclaim, triable by jury,[454] there was no longer any justification for treating the court as possessing a discretion entitling it to try Fox's claim first without a jury if it saw fit. Noting that there might be cases in which the court might not be able to fully protect the party seeking equity from irreparable harm by allowing a jury case to go forward, the *Beacon Theatres* Court insisted that "the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court."[455]

Beacon Theatres, then, represents more than simply a rule for ordering the trial of related legal and equitable claims joined in the same action. It represents an unhinging of the right from past prac-

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447. *See* McCoid, *supra* note 418, at 6-7.

448. *See Beacon Theatres*, 359 U.S. at 502-03.

449. Or at least so thought the court of appeals in *Beacon Theatres v. Westover*, 252 F.2d 864, 873 (9th Cir. 1958), *rev'd*, 359 U.S. 500 (1959).

450. 28 U.S.C. §§ 2201-02 (1994).

451. *See id.* at § 2201(a).

452. Damages pendente lite result from the ongoing litigation. *See* BLACK'S LAW DICTIONARY 1134 (6th ed. 1990).

453. *See* FED. R. CIV. P. 65(a).

454. *See* Beacon Theatres v. Westover, 359 U.S. 500, 504 (citing Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27, 29 (1916)).

455. *Id.* at 510. It is not surprising that Justice Black, in authoring *Beacon Theatres*, took this bold step to protect the jury trial. From a recent biography of Justice Black:

> No stronger proponent of jury trial has ever sat on the Supreme Court than this old trial lawyer. . . . When a jury decides against someone, Black liked to say, the losing litigant knows he has gotten a fair shot, whereas if the judge decides against someone, the litigant often thinks that the system is rotten.

ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 322 (1994).

tices.[456] The analysis of *Beacon Theatres* has become an important element in resolving problems of the applicability *vel non* of trial by jury under the Seventh Amendment even where the merger of law and equity is not a factor.[457]

While *Higgins* relied primarily on the result of *Beacon Theatres* as persuasive precedent in interpreting the effect of Maryland Rule 2-301 on the right to trial by jury,[458] it is not clear that the Court of Appeals of Maryland intended to follow the route traveled by the Supreme Court in reaching that result. In short, *Higgins* contains no analysis as to whether the demarcation between law and equity, so critical for purposes of trial by jury, is flexible or static; it does not address whether equity may be reduced by enhancement of the adequacy of legal remedies through procedural reform.

Although neither the Supreme Court nor the Court of Appeals of Maryland has applied *Beacon Theatres* or *Higgins* respectively to flesh out the constitutional implications of a trial court's power to grant a new trial, those decisions, particularly *Beacon Theatres*, may shed light on such an inquiry. *Beacon Theatres* did not simply protect the jury trial right of a legal counterclaimant in a suit that originated in equity.[459] The case provided a basis for re-examination of the line between law and equity. It established a clear bias in favor of jury trial when that right comes into conflict with the tradi-

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456. *See Beacon Theatres*, 359 U.S. at 506. The notion that the Seventh Amendment jury trial right should not be fettered strictly to circumstances as they existed in 1791 is not new. In *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830), Justice Story parsed the phrase "suits at common law" in light of the intent of the framers:

> By *common law*, they meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.

Id. at 447 (emphasis added). This flexible notion allowed the right to jury trial to be extended to actions that did not exist in 1791 but were deemed analogous to actions that did. *See generally* Tull v. United States, 481 U.S. 412 (1987) (stating that the Seventh Amendment applies to the issue of liability under section 1319(b) of the Clean Water Act); Curtis v. Loether, 415 U.S. 189, 195 (1974) (involving a jury trial in a racial discrimination suit under the housing provisions of the Civil Rights Act of 1968).

457. *See* McCoid, *supra* note 418, at 6.

458. *See* Higgins v. Barnes, 310 Md. 532, 543, 530 A.2d 724, 729 (1987).

459. *See Beacon Theatres*, 359 U.S. at 508.

tional prerogatives of equity[460] that have generally allowed a jury trial to carry the day.[461] That bias may yet influence the current reassessment of the new trial power of a trial judge in the federal courts.

Higgins, perhaps because its rationale was ostensibly narrower than that of *Beacon Theatres*, has so far provided less clear guidance to later decisions that have addressed the right to jury trial. The court took a protective view of jury trial in the context of deciding the effect of merger on the adjudication of mixed claims.[462] This sheds some light on how to grapple with other jury trial issues, even if it does not provide an analytical framework for such grappling.

B. The Development of the Beacon Theatres Analysis in Later Supreme Court Decisions

The next occasion after *Beacon Theatres* for the Supreme Court to address the right to trial by jury was *Dairy Queen, Inc. v. Wood*,[463] which involved the unhappy demise of a franchise relationship. The plaintiffs owned the Dairy Queen trademark.[464] The defendant contracted with the plaintiffs for use of the trademark in certain portions of Pennsylvania.[465] The contract provided for payments of 50% of gross receipts as well as annual minimum payments without regard to receipts.[466] The plaintiffs notified the defendant of a breach in the contract's payment provisions and asserted that the contract would be terminated unless the default was remedied immediately.[467]

The plaintiffs sued in federal district court when the defendant continued to use the trademark after termination of the agree-

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460. Professor McCoid sees this bias as rooted in a "fundamental assumption that jury trial is a desirable form of fact-finding in a democratic society." McCoid, *supra* note 418, at 15.

461. Another factor that has played a crucial role in the development of the law of jury trial in the federal courts, and which has strongly favored the jury trial, is the Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), where the Court followed Justice Story's analogical approach in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), in determining that actions for damages under the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1994), were triable to a jury. *See Curtis*, 415 U.S. at 198.

462. *See Higgins*, 310 Md. at 541, 530 A.2d at 728.

463. 369 U.S. 469 (1962).

464. *See id.* at 473.

465. *See id.*

466. *See id.* at 473-74.

467. *See id.* at 474.

ment.[468] The plaintiffs' suit alleged that the defendant had committed a material breach of the contract, that its use of the trademark after plaintiffs' termination of the contract constituted trademark infringement, that the defendant's financial condition was unstable, and that plaintiffs were threatened with irreparable injury for which they had no adequate remedy at law.[469] The plaintiffs sought temporary and permanent injunctions of the defendant from use of plaintiffs' trademark, an accounting to determine the exact amount owing to the plaintiffs, and an injunction pending the accounting to prevent defendant from collecting any money from Dairy Queen stores in its territory.[470]

The defendant did not counterclaim. Denying that it had breached the contract and contending that the parties had orally modified it, the defendant asserted laches and estoppel on the part of plaintiffs that had permitted the defendant to spend large amounts of money developing its right to use the trademark and alleged violations of the antitrust laws by the defendant in dealing with the trademark.[471] The defendant demanded a trial by jury.[472]

The district court granted the plaintiffs' motion to strike defendant's jury demand on the basis that either the action was purely equitable or that whatever legal issues were raised were incidental to equitable issues.[473] The Court cut through the plaintiffs'

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468. *See id.*

469. *See id.* at 475.

470. *See id.*

471. *See id.* at 475-76.

472. *See id.* at 476.

473. *Id.* at 470. The Court summarily dismissed the plaintiffs' contention that there was no right to jury trial in the action because the legal issues were merely incidental to equitable issues. The Court cited *Scott v. Neely*, 140 U.S. 106, 117 (1891) for the proposition that a court of equity cannot even take jurisdiction of a suit "in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief." *Dairy Queen Inc.*, 369 U.S. at 470-71 (citing *Scott*, 140 U.S. at 117). *Scott* seems more to be based on the appropriateness of the exercise of equitable jurisdiction in the absence of inadequacy of the remedy at law. It does not appear to address the effect on jury trial when resort to equity is appropriate. To state that jury trial may not be sidestepped when the legal relief is incidental may stretch *Scott* somewhat. The Court of Special Appeals of Maryland clearly has not accepted Justice Black's view that the right to jury trial must be preserved when legal and equitable claims and remedies are combined in the same pleadings. *See* Mattingly v. Mattingly, 92 Md. App. 248, 607 A.2d 575 (1992); Kahle v. John McDonough Builders, Inc., 85 Md. App. 141, 582 A.2d 557 (1990); Fink v. Pohlman, 85 Md. App. 106, 582 A.2d 539 (1990).

claims for relief and agreed with the defendant that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal."[474] The Court viewed the suit as a claim by plaintiffs to recover "whatever was owed then under the contract," plus "damages for infringement of their trademark . . . ."[475] As to the contention by the plaintiffs that they sought an accounting, the Court stated that "the constitutional right to trial by jury cannot be made to depend upon the choices of words in the pleadings."[476]

Turning to *Beacon Theatres*, the Court stated that the right to maintain a suit for equitable accounting required absence of an adequate remedy at law.[477] The accounts between the parties must be of such a complicated nature that "only a court of equity can satisfactorily unravel them."[478] The Court pointed to the ability of a trial court, under Rule 53(b) of the Federal Rules of Civil Procedure, to appoint masters to assist a jury to untangle accounts too complicated for them to do so alone.[479] In light of the procedures available under the federal rules, the Court opined that "it will indeed be the rare case" in which it will be shown that equitable jurisdiction is properly invoked.[480] The Court concluded that this was not such a rare case:

> A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. The legal remedy is not inadequate merely because the measure of damages may necessitate a look into petitioner's business records.[481]

In *Dairy Queen*, the Court took the *Beacon Theatres* analysis an important step further. No question of the effect of the merger of law and equity or the order of trial of joined legal and equitable claims was presented in *Dairy Queen*. The enhanced ability of juries under procedures of the federal rules to adjudicate more compli-

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474. 369 U.S. at 476.
475. *Id.*
476. *Id.* at 477-78.
477. *See id.* at 478.
478. *Id.* at 478 (citing Kirby v. Lake Shore & Michigan Southern R. Co., 120 U.S. 130, 134 (1887)).
479. *See id.*
480. *Id.*
481. *Id.* at 478-79.

cated matters contracted the scope of equity. Willingness of the Court to reappraise the scope of equity compels that a suit that might once have been heard in equity must be tried by jury. Although this approach has not been applied to the scope of the power of a trial judge by the Supreme Court or the Maryland Court of Appeals,[482] it could be. If jurors, because of procedural reforms[483] or even because of a higher level of literacy and education in the general population, may adjudicate more sophisticated matters, perhaps the need to control a jury should be contracted.

In its next opportunity to address the scope of the right to jury trial under the Seventh Amendment, *Ross v. Bernhard*,[484] the Court enhanced the scope of the right and provided a further framework for determining its applicability. *Ross* involved a shareholders' derivative action.[485] The trial court denied the defendants' motion to strike the plaintiffs' jury demand and the Second Circuit reversed.[486] The district court evaluated the question of the jury trial right as if the corporation itself had sued on its own behalf.[487] The court of appeals regarded the suit as equitable in nature.[488] Indeed, the Supreme Court noted that the common law refused to entertain suits by shareholders to hold corporate managers responsible and that equity entertained "a suit to enforce a *corporate* cause of action against officers, directors, and third parties."[489] In such a suit there were two things to adjudicate: the corporate claim itself and the plaintiff stockholder's right to sue on behalf of the corporation.[490]

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482. The Court of Special Appeals of Maryland appears to view the equitable nature of accounting as unaffected by procedural changes. *See* Mattingly v. Mattingly, 92 Md. App. 248, 607 A.2d 575 (1992).

483. 9 JAMES W. MOORE, MOORE'S FED. PRAC. § 38.42[3][c] (3d ed. 1997) suggests procedural rules that have enhanced the potential for juries to adjudicate complex cases. Such procedures include: Rule 53, appointment of a master; Rule 42, separate trial of claims or issues; Rule 16, pretrial conferences to simplify issues; Rule 49, use of special verdicts. Rule 1006 of the Federal Rules of Evidence provides for use of summaries of voluminous materials. In *In re Japanese Elec. Prods.*, 631 F.2d 1069, 1088 (3d Cir. 1980), the court, in rejecting a complexity exception to the Seventh Amendment, recommended thoughtful use of the Manual for Complex Litigation to enhance a jury's capabilities in complicated cases.

484. 396 U.S. 531 (1970).

485. *See id.*

486. *See id.* at 532.

487. *See id.*

488. *See* Ross v. Bernhard, 403 F.2d 909, 912 (2d Cir. 1968).

489. *Ross*, 396 U.S. at 534.

490. *See id.* at 534-35.

As it had done in *Beacon Theatres* and *Dairy Queen*, the Court looked to the reason that equity had acted: the unwillingness of the courts of law to entertain a suit by a shareholder had left such a party without an adequate legal remedy.[491] Once equity assumed jurisdiction to decide the question of the shareholder's standing, it could then decide the corporate claim without a jury.[492] This was so whether or not the corporate claim would have been triable by a jury if the corporation itself were the plaintiff.[493]

Reversing the court of appeals's denial of the plaintiffs' right to a jury trial, the Court assessed the scope of equity in light of procedure under the federal rules: "Under the Rules there is only one action – a "civil action" – in which all claims may be joined and all remedies are available. Purely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity, were destroyed."[494] In a merged civil action, the trial court, able to entertain all equitable issues, may resolve the question of the plaintiff's standing to sue.[495] If it deems the plaintiff has standing, it may then try the corporate claim to a jury if it would otherwise be entitled to jury trial.[496]

The magnitude of what the Court wrote in *Ross* may perhaps most clearly be seen through Justice Stewart's stinging dissent:

> In holding as it does that the plaintiff in a shareholder's derivative suit is constitutionally entitled to a jury trial, the Court today seems to rely upon some sort of ill-defined combination of the Seventh Amendment and the Federal Rules of Civil Procedure. Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do, namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States.[497]

Whether Justice Stewart's polemical language is necessary, the Court did precisely as he said. It did something it had *not* done in *Beacon Theatres* or *Dairy Queen*. It took an action from the equity side of the law/equity line and placed it on the law side.

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491. *See id.* at 539.
492. *See id.* at 537.
493. *See id.* at 538.
494. *Id.* at 539-40.
495. *See id.* at 540.
496. *See id.*
497. *Id.* at 543 (Stewart, J., dissenting).

In *a reductio ad absurdam* near the end of his dissent, Justice Stewart questioned where the process would end:

> An equitable suit for an injunction, for instance, often involves issues of fact which, if damages had been sought, would have been triable to a jury. Does this mean that in a suit asking only for injunctive relief these factual issues *must* be tried to the jury, with the judge left to decide only whether, given the jury's findings, an injunction is the appropriate remedy?[498]

Justice Stewart was not off the mark when he observed: "The Court's decision today can perhaps be explained as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions."[499] This bias has been described as based on the notion that jury fact-finding serves democratic values.[500]

In addition to applying the methodology of *Beacon Theatres* to the matter of characterizing an action for purposes of trial by jury, the Court, in a famous footnote, set out a framework for determining the nature of an action that has served to reinforce the bias in favor of jury trial decried by Justice Stewart: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."[501]

The first of these, pre-merger custom, while perhaps an attempt to restate the obvious, actually creates an ambiguity in determining the jury trial right.[502] The third, the practical abilities of juries, for a

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498. *Id.* at 549-50. Interestingly, the answer to this undoubtedly rhetorical question in *Higgins v. Barnes*, 310 Md. 532, 530 A.2d 724 (1987), is not as clear as Justice Stewart might assume. In determining to protect the right to trial by jury it was the presence of legal *issues*, rather than a discrete claim asserted by the defendant, that triggered the need to protect the right to jury trial. *See supra* note 439 and accompanying text.

499. *Ross*, 396 U.S. at 551 (Stewart, J., dissenting).

500. *See* Rees, *supra* note 5, at 355-56.

501. *Ross*, 396 U.S. at 538, n.10.

502. The merger of law and equity in the federal system occurred with the adoption of the Federal Rules in 1938. *See, e.g., id.* at 539-40. The adoption of the Seventh Amendment, the critical point for distinguishing the respective scopes of law and equity, occurred in 1791. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974); *Ross*, 396 U.S. at 533-34. Passage of nearly a century and a half necessarily entails a different landscape from which to determine the scope of the right to trial by jury. *See generally* Charles W. Wolfram, *The Constitutional History*

time created the erroneous impression that the Court's ability to recharacterize the nature of an action was a double-edged sword.[503] In the years since *Ross*, the Supreme Court, in determining the applicability of a right to trial by jury in particular cases, has demonstrated the "bias" in favor of jury trial that Justice Stewart decried in his dissent in *Ross*. In fact, in all but one case, the Court has held that there is a right to a trial by jury.[504] The Supreme Court's recent

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of the Seventh Amendment, 57 MINN. L. REV. 639, 643 (1973); Lettow, *supra* note 16, at 505-08 (discussing the continual evolution of the judge-jury relationship).

503. For example, in *In Re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976), a district court judge struck plaintiffs' demand for jury trial in an action under state and federal securities laws. *See id.* at 108. Noting the enormous amount of documentary material that had been generated in the case, the court stated that "[t]he factual issues, the complexity of the evidence that will be required to explore those issues, and the time required to do so leads to the conclusion that a jury would not be a rational and capable fact finder." *Id.* at 103. For the court, the jury's inability to act as a rational and capable fact finder raised Fifth Amendment due process considerations. *See id.* at 104. It described superior capability to adjudicate such a case and justified its action on the basis of the third part of footnote 10 in *Ross*. *See id.* at 105. The court appeared to view the right to civil jury trial in the federal courts not as a constitutional mandate but rather as a general policy preference: "There can be no doubt that jury trials are favored in civil litigation." *Id.* at 103. This approach has made little headway in the lower federal courts. *See* FDIC v. University Anclote, Inc., 764 F.2d 804, 814, n.6 (11th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1985); *In re* United States Fin. Sec. Litig., 609 F.2d 411, 432 (9th Cir. 1979), *cert. denied sub. nom.* Gant v. Union Bank, 446 U.S. 929 (1980). The denial of certiorari in both cases shows that the Supreme Court has offered no further encouragement for development of a complexity exception to the right to jury trial. This has led leading commentators to state:

> Whether the Supreme Court will be willing to utilize the *Ross* test, particularly the third criterion, in setting a limit on the *Beacon Theatres* principle is highly debatable. In the more than twenty years since *Ross* there has been no indication that the Court is likely to retreat from its expansive interpretation of the Seventh Amendment.

Friedenthal, *supra* note 4, at 499 (footnote omitted). In *Higgins v. Barnes*, the court of appeals shared this skepticism about a complexity exception to the right to trial by jury. *See* Higgins v. Barnes, 310 Md. 532, 547, n.7, 530 A.2d 724, 731, n.7 (1987).

504. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (claiming damages under the Copyright Act); Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 561 (1990) (claiming breach of a union's duty of fair representation); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) (bringing an action by bankruptcy trustee to set aside fraudulent transfers); Tull v. United States, 481 U.S. 412, 427 (1987) (requesting a fine to be imposed under the Clean Water Act). In *Markman v. Westview*

trend of favoring jury trials is largely a result of a presumption in favor of jury-determined damages. Historically, however, the Court's decision to allow a jury trial was reached through either historical analogy or mere indulgence in the affinity for a jury determination of damages.

In *Tull v. United States*,[505] the first of these post-*Ross* decisions, the federal government sued a developer for a civil penalty under the Clean Water Act[506] for dumping fill on the wetlands of Chincoteague Island, Virginia.[507] Such a cause of action did not exist in 1791. To determine whether such action entailed a right to jury trial, the Court focused on whether the case was analogous to suits at common law or those tried in courts of equity or admiralty, neither of which traditionally required a trial by jury.[508] The Court explained that, in addressing this question, it needed to "examine both the nature of the action and the remedy sought."[509]

Seeking a jury trial, the developer analogized the suit of the government to an action for a debt, which is a suit at common law.[510] The Court accepted this analogy.[511] Although the Government contended that the action was analogous to a suit to abate a public nuisance, the Court rejected this argument, explaining: "We need not rest our conclusion on what has been called an 'abstruse histor-

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Instruments, Inc., 517 U.S. 370 (1996), the Court held that in an action for patent infringement, construction of the patent, including the patent's terms of art within the claim, was within the province of the court. *See id.* at 372. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court held that collateral estoppel may preclude a trial by jury if the facts adjudicated against a party in a prior equitable action are subsequently alleged by a different party in a later action. *See id.* at 337. *Parklane* is significant because it does not adhere to the policy of favoring a jury trial as found in *Beacon Theatres, Dairy Queen,* and *Ross.* It does accept their teaching that the line demarcating the right to trial by jury is not fixed in antiquity. *See id.* at 334-35. Strict adherence to the mutuality of estoppel rule, extant in 1791 would have required a jury trial in the second action. It must be noted, however, that *Parklane* is distinguishable from the Court's other civil jury trial cases of recent years because it involved the effects of collateral estoppel on a jury trial in two separate lawsuits, an issue that *Beacon Theatres* and its progeny did not confront.

505. 481 U.S. 412 (1987).

506. 33 U.S.C. § 1319 (1994).

507. *See Tull*, 481 U.S. at 414.

508. *See id.* at 417.

509. *Id.*

510. *See id.* at 418.

511. *See id.* at 420.

ical' search for the nearest eighteenth century analog."[512] The Court focused on the relief sought, a penalty, which could only be traditionally enforced in courts of law.[513] The net result of *Tull* is a de-emphasis on the historical nature of the action and a re-focus on the forum that historically determined the remedy.

Granfinanciera, S.A. v. Nordberg[514] was the next case in which the Court addressed the applicability *vel non* of the right to jury trial. In *Granfinanciera,* a bankruptcy trustee sought to set aside a fraudulent transfer.[515] Unlike the action in *Tull,* however, this type of action did exist in the eighteenth century.[516] The Court therefore emphasized equally the historical nature of the action and the relief sought, determining that such actions were maintainable at law.[517] The Court held that the plaintiff "plainly [sought] relief traditionally provided by law courts or on the law side of courts having both legal and equitable dockets" because the plaintiff merely sought the payment of money and did not request an accounting.[518]

In some situations, however, analogy is not at all helpful in determining the nature of the claim and the existence of a right to a jury trial. In *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry,*[519] the plaintiffs sued their union under the Labor Management Relations Act[520] for breaching the duty of fair representation—an action that did not exist in eighteenth century England.[521] The Court was essentially unable to determine whether the action was historically

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512. *Id.* at 421, (citing Ross v. Bernhard, 396 U.S. 531, 538, n. 10 (1970)).

513. *See Tull,* 481 U.S. at 422. The Court found that while the defendant had a right to a jury trial as to liability, Congressional assignment for determining the amount of the penalty left solely to the judge does not violate the defendant's right to a trial by jury. *See id.* at 426-27. The Court explained that Congress could have fixed the penalty itself and therefore, could delegate the task to a trial judge. *See id.* at 427. Bifurcation of liability and penalty between jury and judge prompted Justice Scalia to state in his separate opinion: "[w]hile purporting to base its determination (quite correctly) upon historical practice, the Court creates a form of civil adjudication I have never encountered. I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court." *Id.* at 428 (Scalia, J., concurring in part and dissenting in part).

514. 492 U.S. 33 (1989).

515. *See id.* at 36.

516. *See id.* at 43.

517. *See id.*

518. *Id.* at 49.

519. 494 U.S. 558 (1990).

520. 29 U.S.C. § 185 (1994).

521. *See Terry,* 494 U.S. at 565.

analogous to legal or equitable actions.[522] It concluded that the plaintiffs were entitled to a jury trial because "the money damages [they sought] are the type of relief traditionally awarded by courts of law."[523] This analysis, like that of *Tull*, is historical in a looser sense than that of *Granfinanciera*. Once the remedy is ascertained, if it is monetary, then there is a right to jury trial.

With time, the Court has relied less and less on the ability of a party to establish analogies to historical causes of action grounded in law or equity. In *Markman v. Westview Instruments, Inc.*,[524] the Court found the right to trial by jury inapplicable to the action involved and de-emphasized strict historical analogy to eighteenth century actions.[525] It did so mostly because it could find no answer there.[526] In the absence of such guidance, the Court explained: "We are forced to make a judgment about the scope of the Seventh Amendment guarantee without the benefit of any foolproof test."[527] In deciding whether issues in an action under the patent law might be determined by Congress to be triable by jury, the Court de-emphasized minute details of the right as it existed in the eighteenth century: "'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.'"[528] Without the assistance of historical fetters, the Court held that "functional considerations . . . play their part in the choice between judge and jury to define terms of art."[529]

The Court concluded that construction of written instruments "is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis."[530] The Court regarded the jury's capabilities—evaluating demeanor, sensing the mainsprings of human conduct, or reflecting community stan-

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522. The union, which in North Carolina did not want a jury trial, analogized the cause of action to an action for breach of trust. *See id.* at 567. The employees analogized it to attorney malpractice. *See id.* at 568. Although the Court found the trust analogy more persuasive, it concluded the historical analysis was "in equipoise as to whether respondents are entitled to a jury trial." *Id.* at 570.

523. *Id.* at 573.

524. 517 U.S. 370 (1996).

525. *See id.* at 384 (noting that when the practice of historical analogy provides no clear answer, the Court must make a judgment without its benefit).

526. *See id.* at 377.

527. *Id.*

528. *Id.* at 377-78 (quoting Tull v. United States, 481 U.S. 412, 426 (1987)).

529. *Id.* at 388.

530. *Id.*

dards—as "much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent."[531]

The Supreme Court's disposition does not represent a complete abandonment of the right to a jury trial in *Markman*; however it must be noted that the Court's decision in *Markman* takes only part of the case from the jury. The Court acknowledged that once the patent is construed, the question of infringement is one for the jury.[532] The Court's holding did not arrogate the determination of damages to the trial court. Like *Tull* and *Terry*, *Markman* departs from a strict historical analysis of trial by jury. Unlike *Tull* and *Terry*, it embraced a functional rather than a remedial analysis. Although the Court emphasized functions the judge might more adequately perform, it did recognize functions that are more appropriate for a jury.

Finally, in *Feltner v. Columbia Pictures Television, Inc.*,[533] the Court emphasized the importance of the jury's role in determining damages.[534] In *Feltner*, the plaintiff sought statutory damages under the Copyright Act.[535] The defendant sought trial by jury.[536] Unable to find that the statute guaranteed this right, the Court turned to the Seventh Amendment.[537] Looking to English and early American precedents, the Court determined that copyright claims were triable to a jury.[538] Not denying this finding, the plaintiff contended that the statute itself created an equitable remedy.[539] The Court reverted

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531. *Id.* at 389-90.

532. *See id.* at 384 (citing Winans v. Denmead, 56 U.S. 330, 338 (1854) (stating that the determination of whether an infringment occurred is a question of fact for the jury)).

533. 118 S. Ct. 1279 (1998).

534. *See id.* at 1283-88.

535. *See id.* at 1282; 17 U.S.C. § 504(c)(1).

536. *See Feltner*, 118 S. Ct. at 1282.

537. *See id.* at 1284 (stating that upon determining that there is no statutory right to a jury trial when a copyright owner elects to recover statutory damages, the court must turn to the constitutional question).

538. *See id.* at 1285-86 (stating that historical evidence suggests that copyright actions seeking damages are tried by a jury).

539. *See id.* at 1286 (noting that the plaintiff contended that statutory damages are clearly equitable in nature). The plaintiff's argument was based on the language of the Copyright Act, 17 U.S.C. § 504(c)(1), which provides:

> Except as provided by clause (2) of this subsection, the copyright owner may elect at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than $500 or more than

to the "general rule" that monetary relief is legal.[540] Focusing specifically on the damages remedy, the Court explained: "The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner. It has long been recognized that 'by the law the jury are the judges of the damages.'"[541] The Seventh Amendment thus supplied the right to jury trial that Congress had not provided.

Feltner and *Markman* reflect the most recent pronouncements on the allocation of power between judge and jury in the federal courts under the Seventh Amendment. If *Markman* allows an expansive modification of the trial court's role due to the judge's superior capacity to certain issues pertaining to liability, then it would seem that *Feltner* would sanction a similar recognition of the jury's power, even at the expense of the trial court's power to grant a new trial. The Supreme Court has not yet articulated such a principle. Indeed, the power of appellate courts in the federal system even to review trial court dispositions of new trial motions has been just recently definitively established.[542] Now that such review is permitted, it is difficult to think of a more appropriate subject than the interplay of the grant of new trial with the Seventh Amendment because, as the Supreme Court has noted: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[543] This assertion provides a uniform and clear rationale for the increasing number of federal appellate decisions that have assessed the granting of new trial orders in light of the Seventh Amendment.

C. *Trial by Jury in Maryland After* Higgins

The Supreme Court case law demonstrates how the right to jury trial has evolved generally in the federal system in the wake of

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17 U.S.C. § 504(c)(1) (1994).

540. *See Feltner*, 118 S. Ct. at 1287 (citing Chauffers, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 570 (1990)).

541. *Id.* at 1287 (quoting Lord Townshend v. Hughes, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-95 (C.P. 1677)).

542. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 435-36 (1996) (holding that appellate review of a trial judge's disposition regarding a motion for a new trial is permitted). For a discussion of *Gasperini*, see *infra* notes 649-64 and accompanying text.

543. Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

Beacon Theatres. It is fairly easy to see how this right developed from seeds planted in *Beacon Theatres.* Likewise, this evolution might provide guidance for the development of the right to jury trial in Maryland, particularly in light of the *Higgins* court's adoption of the result and some of the language of *Beacon Theatres.* Yet, subsequent decisions by the Maryland appellate courts do not appear to have exhibited the same bias toward jury trials that the Supreme Court has shown when interpreting the Seventh Amendment.

In the first appellate case that grappled with the question of trial by jury after *Higgins,* the court of special appeals, in *Hashem v. Taheri,*[544] was true to and arguably extended *Higgins.* In *Hashem,* the plaintiff filed both stockholder derivative claims and direct claims against both a corporation and individuals.[545] The plaintiff demanded a jury trial.[546] The defendants responded that the plaintiff was not a stockholder of the corporation, and therefore was unable to bring stockholder derivative claims or direct claims.[547]

At trial, the court decided to try both issues in the case without a jury: the plaintiff's status in the corporation and the plaintiff's equity-based derivative claims.[548] After the non-jury trial, the court ruled that the plaintiff was a stockholder and granted equitable relief as to his equitable derivative claims.[549] Before a jury was empaneled to hear the plaintiff's remaining legal claims, the defendants filed an interlocutory appeal.[550] The defendants contended that they were deprived of their right to trial by jury on the issue of whether the plaintiff was a stockholder, an issue necessary to the success of both legal and equitable claims of the plaintiff.[551]

The court held that although *Hashem* and *Higgins* were factually distinguishable, *Hashem* required the same result.[552] As noted by the *Hashem* court, the court of appeals in *Higgins* held that the trial

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544. 82 Md. App. 269, 571 A.2d 837 (1990).

545. *See id.* at 270-71, 571 A.2d at 838.

546. *See id.* at 271, 571 A.2d at 838.

547. *See id.*

548. *See id.* at 271, 571 A.2d at 838-39. The court originally granted the plaintiff's motion to bifurcate these two issues; however, on the scheduled date of the first trial, the court decided that both issues would be heard simultaneously by the court without a jury. *See id.*

549. *See id.* at 271, 571 A.2d at 839.

550. *See id.* at 271-72, 571 A.2d at 839 (holding that the appeal was proper from an order granting an injunction under Maryland Code Annotated, Courts and Judicial Proceedings Article, section 12-303(3)(i)).

551. *See id.* at 273, 571 A.2d at 840.

552. *See id.* at 273-74, 571 A.2d at 840.

court could not make a determination of the plaintiff's status as a stockholder that would be binding for purposes of plaintiff's legal claims in adjudicating claims not triable by jury.[553] Likewise protecting the defendant's right to a jury trial, notwithstanding its recognition of the historically equitable nature of the stockholder's derivative suit,[554] the *Hashem* court followed *Higgins* and noted that this historical pedigree did not entitle the chancellor to use his "clean-up" powers to resolve the entire suit.[555]

The *Hashem* court also relied on *Ross v. Bernhard* [556]—a case in which the Supreme Court had confronted the issue of jury trial in shareholders derivative suits.[557] Protecting the defendant's right to a jury trial notwithstanding its recognition of the historically equitable nature of the stockholder's derivative suit,[558] the court implicitly accepted the teaching of *Ross* that this historical pedigree did not entitle the chancellor to use "clean-up" powers to resolve the entire suit.[559]

By holding that the plaintiff's status was within the province of a jury, the *Hashem* court arguably went further than the Court in *Ross*.[560] Unlike the Court in *Ross*, the court in *Hashem* did not view plaintiff's status, at least insofar as it entailed a determination of whether he was a stockholder, as a preliminary matter.[561] The court in *Hashem*, unlike the Court in *Ross*, did not assert the rationale that the expansion of remedies at law had affected the scope of equity.[562]

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553. *See id.* at 273, 571 A.2d at 839 (citing Higgins v. Barnes, 310 Md. 532, 530 A.2d 724 (1987)).

554. *See id.* at 271 n.3, 571 A.2d at 838 n.3 (citing Waller v. Waller, 187 Md. 185, 189-92, 49 A.2d 449, 452-53 (1946)).

555. *See id.* at 272, 571 A.2d at 839 (citing Higgins v. Barnes, 310 Md. 532, 540-41, 530 A.2d 724, 728 (1987)).

556. 396 U.S. 531 (1970).

557. *See Hashem*, 82 Md. App. at 273-74, 571 A.2d at 840.

558. *See id.* at 271 n.3, 571 A.2d at 838 n.3.

559. *See id.* at 272, 571 A.2d at 839.

560. In *Ross*, the Court observed that, "[i]n a civil action presenting a stockholder's derivative claim, the court after passing upon plaintiff's right to sue on behalf of the corporation is now able to try the corporate claim for damages with the aid of a jury." *Ross*, 396 U.S. at 540 (footnote omitted).

561. The Court in *Ross* appeared to sue in terms of satisfaction of conditions precedent, noting: "One precondition for the suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions." *Id.* at 534 (footnote omitted).

562. *See id.* at 540 (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959)).

It viewed the case simply as presenting factually interwoven legal and equitable claims. It followed *Higgins* in requiring in such a situation that the issue important to the legal claim be tried first to a jury. Implicitly, however, the court diminished the power of equity in a stockholder's derivative suit.

Yet, the *Hashem* court's embrace of such a broad right to a jury trial has not typified subsequent decisions by the Court of Special Appeals of Maryland. In a trilogy of cases soon after *Hashem*, the court of special appeals provided much less protection to the right to jury trial than had the *Hashem* court. These decisions were *Fink v. Pohlman*,[563] *Kahle v. John McDonough Builders, Inc.*,[564] and *Mattingly v. Mattingly*.[565] In *Fink*, the decedent, survived by four children, had executed a codicil essentially disinheriting two of her children.[566] One of the children who had been disinherited alleged that she had made an agreement with the personal representative of the estate, her brother, in which she would receive a one-quarter share of the estate in exchange for her not contesting the probate of the will in the state of Florida.[567] After the estate proceeding was resolved, the personal representative offered his sister a sum that was much less than what she understood to be one quarter of the estate.[568]

The plaintiff sued the personal representative and another sibling in Maryland for breach of contract, conversion, and breach of trust.[569] The breach of contract claim was against the personal representative in that capacity only.[570] The trial court dismissed the claim against the personal representative, holding that Maryland courts do not have jurisdiction over a personal representative appointed in Florida.[571] It also found that there was no conversion where there was an alleged breach of contract and that a familial relationship was an insufficient basis for finding a fiduciary relationship or imposing a constructive trust.[572] The trial court struck the plaintiff's jury demand as to the breach of trust claims.[573]

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563. 85 Md. App. 106, 582 A.2d 539 (1990).
564. 85 Md. App. 141, 582 A.2d 557 (1990).
565. 92 Md. App. 248, 607 A.2d 575 (1992).
566. *See Fink*, 85 Md. App. at 109-10, 582 A.2d at 540.
567. *See id.* at 110, 582 A.2d at 541.
568. *See id.*
569. *See id.* at 110-11, 582 A.2d at 541.
570. *See id.* at 111, 582 A.2d at 541.
571. *See id.* at 111-12, 582 A.2d at 541.
572. *See id.* at 111, 582 A.2d at 541.
573. *See id.*

In consideration of the plaintiff's contention that her right to jury trial had been infringed,[574] the court cited *Higgins* and *Hashem*, but insisted that "[t]he effect of the merger of law and equity and the *Higgins* decision is not to convert nonjury cases to jury cases."[575] Noting that it might be presented with a different question if a count for breach of contract had survived, the court held that there was no right to trial by jury on the breach of trust claim.[576]

The plaintiff sought damages against the defendants individually to the extent that the remaining assets of the estate were not sufficient to provide her one-quarter of the original estate.[577] The court perceived this as a claim for legal relief, but regarded it as a collateral request.[578] Thus, the equitable character of the claim was unaltered.[579] The lack of a cause of action which could give rise to the legal remedy the plaintiff sought made her right to jury trial problematic. The court's implicit determination with respect to the assertion of breach of fiduciary duty, in the context of decedents' estates, was prescient; the court of appeals later so held.[580]

Nevertheless, the route by which the court reached its result does not seem entirely consistent with *Higgins*. Clearly the court in *Fink* acted upon its characterization of the plaintiff's remaining claim as equitable.[581] In *Higgins*, the court addressed the characterization of an action and its effect on jury trial: "In the federal courts, then, the entitlement to jury trial is not determined simply by the characterization of the action as a whole as legal or equitable."[582] Placing its imprimatur on this federal approach, the *Higgins* court also commented: "Alternatives to the federal approach fail to safeguard the constitutionally protected right to jury trial. Granting or denying a jury trial based on the characterization of the action as 'essentially legal' or 'essentially equitable' has produced unpredict-

574. The court also addressed the question of the liability of the defendants only as individuals, upholding the trial court's dismissal of the conversion claim because it is necessary to show a positive tortious act to make out a claim for conversion arising out of a contract. *See id.* at 115, 582 A.2d at 543. The issue of the liability of the personal representative was not appealed. *See id.* at 112, 582 A.2d at 541.

575. *Id.* at 120, 582 A.2d at 546.

576. *See id.* at 120-21, 582 A.2d at 546.

577. *See id.* at 121, 582 A.2d at 546.

578. *See id.*

579. *See id.*

580. *See* Kann v. Kann, 344 Md. 689, 690 A.2d 509 (1997).

581. *See Fink*, 85 Md. App. at 121, 582 A.2d at 546.

582. Higgins v. Barnes, 310 Md. 532, 547, 530 A.2d 724, 731 (1987).

able results and offers little certainty to litigants in planning their own actions."[583] The approach of the court in *Fink* has not been employed by lower federal courts.[584]

The next in the trilogy of court of special appeals cases addressing *Higgins*-type problems is *Kahle v. John McDonough Builders, Inc.*[585] In *Kahle*, a builder sought to enforce a mechanic's lien for failure of the defendants to make payments on a cost-plus-fixed-fee contract.[586] The defendants counterclaimed for breach of contract,[587] contending that the builder had established a relationship of trust and confidence with them and that he had breached this trust in not informing them of costs far beyond those originally projected.[588] The defendants demanded a jury trial.[589]

In a joint jury and bench trial, the jury heard the defendants' breach of fiduciary duty claim, which was for $250,000, while the plaintiff's claim to enforce the mechanic's lien was heard without a jury.[590] The trial judge determined that defendants owed the builder $145,151.25.[591] He limited the jury to consideration only of defective workmanship,[592] resulting in a verdict for the defendants of $12,000.[593] The trial court subtracted that amount from the amount it awarded on the mechanic's lien claim.[594]

The court of special appeals held that the defendants were not unjustly deprived of a jury trial under the circumstances.[595] The court viewed both the suit to enforce the mechanic's lien and the breach of fiduciary duty counterclaim as equitable.[596] This is appro-

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583. *Id.* at 548, 530 A.2d at 732 (footnote omitted).
584. *See* 8 MOORE ET AL., *supra* note 483, § 38.31[5][b][ii].
585. 85 Md. App. 141, 582 A.2d 557 (1990).
586. *See id.* at 145, 582 A.2d at 559.
587. *See id.*
588. *See id.* at 145-46, 582 A.2d at 559. The original estimate of cost-plus-fixed-fee was $509,000. *See id.* at 144, 582 A.2d at 558. At the time of suit, the developer claimed $881,000. *See id.* at 145, 582 A.2d at 559.
589. *See id.* at 143, 582 A.2d at 557.
590. *See id.* at 143, 582 A.2d at 558.
591. *See id.*
592. *See id.* at 149, 582 A.2d at 560.
593. *See id.* at 143, 582 A.2d at 558.
594. *See id.* The total amount of judgment for the plaintiff was $133,151.25 plus prejudgment and post-judgment interest on the mechanic's lien claim. *See id.*
595. *See id.* at 154, 582 A.2d at 563 (concluding that the trial court properly reserved the disposition of the breach of fudiciary relationship claim).
596. *See id.* The court emphasized that "[a]lthough we have merged law and equity in Maryland, we have not eradicated the historical judicial function of determining equitable issues." *Id.*

priate with respect to the mechanic's lien;[597] the characterization of the breach of trust as equitable in the context of a construction contract was probably not consistent with *Beacon Theatres*,[598] *Dairy Queen*[599] or even *Higgins*.

The court in *Kahle* distinguished *Higgins*, noting that the defendant in *Higgins* asserted an independent legal counterclaim that had no equitable component.[600] The court essentially created this distinction by gerrymandering the breach of fiduciary duty solely to the equitable mechanic's lien claim by the plaintiff.[601]

Higgins itself was quite explicit that the right to jury trial did not depend on legal issues being raised in the isolation of a discrete legal claim.[602] The *Higgins* court noted that the plaintiff's claim was defensive and did not qualify as a separate claim under Maryland Rule 2-602.[603] The court went on to observe:

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597. Former Maryland rule BG 71, applicable at the time of this case, provided "[a]n action to establish a mechanic's lien is equitable in nature." *See id.* at 150, 582 A.2d at 561 (quoting MD. R. CIV. P. BG 71).

598. For a discussion of *Beacon Theatres*, see *supra* notes 416-57 and accompanying text.

599. For a discussion of *Dairy Queen*, see *supra* notes 463-81 and accompanying text.

600. *See Kahle*, 85 Md. App. at 153, 582 A.2d at 562-63. In contrast, the court declared: "[T]raditionally under Maryland law, breach of fiduciary duty is an equitable principle." *Id.* at 153, 582 A.2d at 563.

601. There is considerable logic to treating a breach of trust claim as equitable, but such logic is not inescapable. In *Kann v. Kann*, 344 Md. 689, 690 A.2d 509 (1997), the court held "that there is no universal or omnibus tort for the redress of breach of fiduciary duty." *Id.* at 713, 690 A.2d at 521. It found that there was no action at law against a fiduciary of a decedent's estate. *See id.* at 712-13, 690 A.2d at 520-21 (discussing the court's concern over any potential elimination of "the nearly complete exclusivity of equitable jurisdiction" in the case of trustees). In so doing, however, the court did not inexorably preclude trial by jury with respect to claims for breach of fiduciary duty:

> Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem. Whether the cause or causes of action selected carry the right to a jury trial will have to be determined by an historical analysis.

Id. at 713, 690 A.2d at 521. If the court had left open the possibility that breach of a fiduciary duty might be triable by jury in some contexts, it would seem that a counterclaim for breach of contract might be such a context.

602. *See* Higgins v. Barnes, 310 Md. 532, 551, 530 A.2d 724, 733 (1987).

603. *See id.* at 535 n.1, 530 A.2d at 725 n.1 (citing East v. Gilchrist, 293 Md. 453, 445 A.2d 343 (1982)).

> [T]hese facts do not affect our decision because our concern is with the nature of the *issues* legitimately raised by the pleadings, and not with the labels given to the pleadings. The legal issues in this case were identified by Higgins' particularized answer to the complaint, and our decision does not turn on the fact that a counterclaim was filed.[604]

It may be that it was appropriate for the court in *Kahle* to treat the breach of trust issue as an equitable defense to a claim for an equitable remedy. In light of *Higgins*, it is not appropriate to do so because the issue was not raised in a discrete legal claim.

The net result of *Kahle* is that the plaintiff was able to divest, for the most part, the defendant's right to jury trial by suing first for a mechanic's lien. One cannot deny the policy behind the mechanic's lien, providing the tradesman an efficient remedy to collect the value of his services.[605] Allowing most of the breach of contract dispute to take on the equitable character of the mechanic's lien appears to be contrary to *Dairy Queen, Inc. v. Wood*.[606] In *Kahle*, as in *Fink*, the court protected the traditional scope of equity in a way that allowed sidestepping a jury trial of legal issues.

The third in the trilogy of court of special appeals decisions is *Mattingly v. Mattingly*.[607] Like *Fink* and *Kahle*, *Mattingly* found the

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604. *Id.* (emphasis added).

605. *See* Frank J. Klein & Sons, Inc. v. Lauderman, 270 Md. 152, 162, 311 A.2d 780, 785-86 (1973) (noting that "[t]he purpose of the mechanic's lien law is to protect the material men and . . . this law is to be construed in the most liberal and comprehensive manner in their favor.").

606. The existence of the mechanic's lien does not affect the builder's liability under the contract. *See* Sodini v. Winter, 32 Md. 130, 133-34 (1870). Once equity has protected this interest, the buyer's liability may be adjudicated by a jury if the buyer has counterclaimed for breach of contract and demanded a trial by jury. An excellent illustration of the need to carefully protect the right to a jury trial in legal claims, even though the original suit may be technically grounded in equity, is *Dairy Queen* in which the plaintiffs sought to avoid a jury trial by characterizing their claim as an accounting. *See* Dairy Queen v. Wood, 369 U.S. 469, 477-78 (1962). The United States Supreme Court refused to allow the wording of the pleadings to frustrate trial by jury as to what was essentially a breach of contract suit. *See id.* In *Kahle*, the plaintiff was undoubtedly entitled to the protection of the lien, but that did not necessarily warrant recharaterization of the entire dispute as equitable. *See Kahle*, 85 Md. App. at 150-51, 582 A.2d at 561-62.

607. 92 Md. App. 248, 607 A.2d 575 (1992).

right to trial by jury inapplicable to its issues grounded in equity.[608] Unlike the two earlier decisions, the court in *Mattingly* closely employed the approach of *Higgins* and even looked to the progeny of *Beacon Theatres* in reaching its result.[609] In *Mattingly*, two brothers inherited the businesses and property of their father.[610] One brother, Buddy, sold his interest in the lands and business to the other, Aubrey.[611] Buddy's wife contended that this agreement was obtained through "undue influence and other unfair means."[612] She was appointed guardian of Buddy's property and sued to set aside the transfers, for a dissolution of the brothers' partnership, and for an accounting.[613] The defendant, Aubrey, demanded a jury trial. The trial judge denied the plaintiff's motion to strike the demand and the jury found for the defendant.[614]

In analyzing whether the trial court erred in not striking the jury demand, the court noted the intertwined rulings of the federal and Maryland courts:

> [B]oth the Supreme Court and the Court of Appeals have directed that when "the existence of both legal and equitable issues within the same case requires the selection between the jury and the court as the determiner of common issues, the discretion of the trial court 'is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.'"[615]

The court also looked to the three-part test of *Ross v. Bernhard* [616]as developed in *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*,[617] and explained that according to the Supreme Court, the nature of the remedy sought is the most important test in determining applicability of the right to trial by jury.[618]

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608. *See id.* at 257, 607 A.2d at 580.
609. *See id.* at 257-59, 607 A.2d at 580-81.
610. *See id.* at 251, 607 A.2d at 576.
611. *See id.* at 252, 607 A.2d at 577.
612. *Id.* at 253, 607 A.2d at 578.
613. *See id.* at 253, 607 A.2d at 577-78.
614. *See id.* at 253-54, 607 A.2d at 578.
615. *Id.* at 255, 607 A.2d at 579 (quoting Higgins v. Barnes, 310 Md. 532, 544, 530 A.2d 724, 730 (1987) (quoting Beacon Theatres v. Westover, 359 U.S. 500, 510 (1959))).
616. 396 U.S. 531, 538 n.10 (1970).
617. 494 U.S. 558, 569 (1990).
618. *See Mattingly*, 92 Md. App. at 256, 607 A.2d at 579.

Looking at the nature of the action, the court viewed it as one for rescission and accounting between partners, customarily decided by an equity court before the merger of law and equity.[619] The court carefully distinguished *Dairy Queen*, which also sounded in accounting, on the basis that the trial court therein had improperly treated legal issues as incidental to equitable issues.[620] In contrast, the court noted that there were no legal issues in *Mattingly*; any monetary relief entailed "the natural consequence of the winding up of partnership affairs."[621] The court rejected the defendant's contention that submission of the case to the jury was harmless error because of the lower burden of proof with respect to fraud once a confidential relationship has been established in an action in equity.[622]

Although it did not hold that the action was triable by jury, *Mattingly* more than any other Maryland decision has adopted the methodology of the Supreme Court with respect to the applicability of the right to trial by jury.[623] Consideration of this trilogy of decisions by the court of special appeals somewhat in isolation is significant because it provides insight into the Maryland judiciary's conception of the effect of *Higgins* on the boundary between law and equity for purposes of jury trial. All three decisions indicate a tendency *not* to re-examine the scope of equitable jurisdiction in light of procedural innovations that the Supreme Court has viewed as tending to enhance the adequacy of remedies at law.[624] If *Hashem v. Tahert*[625] falls more into the federal mold, it does so only implicitly.

Nevertheless, *Higgins* provides a clear mandate to protect the right to jury trial from usurpation by equity when legal issues are joined with equitable issues or asserted in a forum possessing equitable powers.[626] In *Martin v. Howard County*,[627] the court of appeals reaffirmed this in the strongest terms. Here, Howard County, Maryland brought suit against tenants of a townhouse to stop drug activity on the premises.[628] The statutory scheme used by the plaintiff

619. *See id.* at 257, 607 A.2d at 580.
620. *See id.* at 259-60, 607 A.2d at 581.
621. *Id.* at 260, 608 A.2d at 581.
622. *See id.* at 262, 607 A.2d at 582 (determining that the improper grant of a jury trial resulted in actual prejudice).
623. *See supra* notes 382-543 and accompanying text.
624. *See supra* notes 494-500 and accompanying text.
625. 82 Md. App. 269, 571 A.2d 837 (1990).
626. *See* Higgins v. Barnes, 310 Md. 532, 550-52, 530 A.2d 724, 733 (1987).
627. 349 Md. 469, 709 A.2d 125 (1998).
628. *See id.* at 471-72, 709 A.2d at 127 (construing MD. CODE ANN., REAL PROP. § 14-

permitted a court to order the tenant to vacate within seventy-two hours, upon finding a drug-related nuisance on the premises.[629] This order by itself did not restore the landlord to possession.[630] Such an order resulted if the tenant failed to vacate as ordered and the owner was a party to the action.[631]

The defendants filed a timely demand for jury trial in the district court and the case was transferred to the Circuit Court for Howard County.[632] Although the action sought restitution of the premises to the owner as well as an order of the defendants to vacate, the county moved to strike the jury demand on the basis that the action was equitable in nature.[633] The trial court struck the jury demand and remanded the case to district court.[634] The defendants appealed this order to the Court of Special Appeals of Maryland.[635]

Affirming the order of the circuit court,[636] the court of special appeals bifurcated the relief sought by the plaintiff. It viewed the claim for the defendants to vacate the premises as one for equitable relief to abate a nuisance[637] which did not terminate the tenancy.[638] The court viewed restitution of possession to the landlord as a contingent remedy, applicable only if the tenant violated the order to vacate and after another hearing.[639] This holding ignored the preclusive effect of the finding of drug activity on a claim for possession, directly or indirectly, or that a violation of the order to vacate would have on the claim for restitution of the premises.

In reversing, the Court of Appeals of Maryland concluded that the court of special appeals' procedural view of the case "render[ed] the statutory scheme dysfunctional," because it left the issue of possession unresolved in the consideration of an order for

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120 (1996)).

629. *See id.* at 472-73, 709 A.2d at 127-28 (construing MD. CODE ANN., REAL PROP. § 14-120(f)(1) (1996)).

630. *See id.* at 478, 709 A.2d at 130 (construing MD. CODE ANN., REAL PROP. § 14-120(f)(1)-(2) (1996)).

631. *See id.* at 474, 709 A.2d at 128 (citing MD. CODE ANN., REAL PROP. § 14-120(f)(3) (1996)).

632. *See id.* at 475, 709 A.2d at 128.

633. *See id.* at 477, 709 A.2d at 129.

634. *See id.* at 477-78, 709 A.2d at 130.

635. *See id.* at 478, 709 A.2d at 130.

636. *See* Martin v. Howard County, 107 Md. App. 331, 667 A.2d 992 (1995).

637. *See id.* at 341-42, 667 A.2d at 997-98.

638. *See id.* at 342, 667 A.2d at 998.

639. *See id.* at 343, 667 A.2d at 998.

the defendant to vacate the premises.[640] The court of appeals held that an order of the tenant to vacate terminates the tenant's interest in the property and gives the landlord the right of possession.[641] Under those circumstances, there was a right to trial by jury because:

> [a]n action by or on behalf of a landlord to evict a tenant, on the ground that the tenant no longer is entitled to possession, and torestore possession to the landlord, "'is historically an action at law to which the right to a jury trial has always attached in this State.'"[642]

The court held that the legislature could not constitutionally create a statutory equitable action that would resolve legal disputes and thus circumvent a party's right of trial by jury.[643]

The court of appeals' holding in *Martin* represented a strong reaffirmation of the right to jury trial in instances in which that right comes into conflict with an equitable adjudication. The court observed: "[W]hen a party presents legal issues and legal claims for relief in an action which also involves equitable issues and claims, the party is ordinarily entitled to a jury trial on the legal issues and legal claims for relief."[644] In that *Martin* involved the applicability of the right to trial by jury with respect to an action in which this right was well-established, the court did not address the question whether the scope of equity might be contracted by procedural innovations. It did hold that equity could not be expanded, even by legislative innovations, at the expense of trial by jury.[645]

D. Re-examination of Judge-Jury Interaction

As demonstrated by the post-*Beacon Theatres* development of the right to jury trial in the federal system and in Maryland, particularly

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640. *Martin*, 349 Md. at 492, 709 A.2d at 137. The court of appeals noted that according to the court of special appeals' position, there could be a hearing as to the issue of possession only if the tenants violated the order to vacate. If they did vacate the premises, the premises would be vacant, and an action for ejectment would not lie. *See id.*

641. *See id.* at 492-93, 709 A.2d at 137.

642. *Id.* at 481, 709 A.2d at 131 (quoting Carroll v. Housing Opportunities Comm'n, 306 Md. 515, 521, 510 A.2d 540, 543 (1986) (quoting Bringe v. Collins,. 274 Md. 338, 346-47, 335 A.2d 670, 676 (1975))).

643. *See id.* at 487, 709 A.2d at 134.

644. *Id.* at 481, 709 A.2d at 131.

645. *See id.* at 487, 709 A.2d at 134.

as that right has competed with the traditional scope of equity,[646] the federal courts have been more explicit in articulating a rationale for re-examining and reducing the scope of equity. Both systems, however, have vigorously protected the constitutional right to jury trial.[647] Neither the Supreme Court nor the Court of Appeals of Maryland have assessed the power of a trial court to grant a new trial in light of post-*Beacon Theatres* decisions. While the Supreme Court has examined new trial questions in light of the Seventh Amendment,[648] it has not done so in light of post-*Beacon Theatres* decisions. These decisions demonstrate that the scope of judicial assessment of jury verdicts is amenable to re-examination. The most recent statement by the Supreme Court regarding the relationship between the trial court's power to grant a new trial and the Seventh Amendment was *Gasperini v. Center for Humanities, Inc.*[649] The issue in *Gasperini* was a so-called *Erie* question,[650] whether a state statute must be applied in a suit based on federal diversity jurisdiction.[651] The state statute was a New York law, enacted in 1986 as part of "tort reform" measures,[652] requiring intermediate appellate courts, when reviewing money judgments, to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."[653] This provision expanded the appellate courts' authority to review trial courts' dispositions of motions for a new trial based on excessiveness or inadequacy of a verdict.[654] As to the *Erie* matter, the Supreme Court held that the federal courts could not ignore this New York law in diversity cases.[655] The Court then had to determine how to implement this review of verdicts in light of the Seventh Amendment. The Court noted that the Seventh Amendment re-examination clause[656] bears "on the allocation of

646. *See supra* notes 463-645 and accompanying text.
647. *See supra* notes 504-645 and accompanying text.
648. *See infra* notes 649-701 and accompanying text.
649. 518 U.S. 415 (1996).
650. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
651. *See Gasperini*, 518 U.S. at 418.
652. *See id.* at 423.
653. *See id.* at 418 (quoting N.Y. CIV. PRAC. LAW AND RULES 5501(c) (McKinney 1995)).
654. *See id.* at 423-24.
655. *See id.* at 430-31.
656. The second clause of the Seventh Amendment states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.* at 432 (quoting U.S. CONST. amend. VII).

trial functions between judge and jury [and] the allocation of authority to review verdicts."[657] As a result, the Court concluded that the re-examination clause granted trial courts a large degree of authority to set aside jury verdicts.[658]

As to the power of an appellate court to review trial court dispositions of motions for new trial and, indirectly, the jury verdicts sustained or set aside by such dispositions, the Court held that an appellate court could, consistent with the re-examination clause, review a trial court's disposition of a motion to set aside a jury verdict as excessive.[659] Although *Erie* required that the New York law be applied, the Court treated the allocation of the exercise of this review as a matter of federal law.[660] It provided that the federal trial courts should determine whether jury awards deviate materially from reasonable compensation[661] and that appellate courts should review such action under an abuse of discretion standard.[662]

It is not surprising that the Court, by explicitly sanctioning appellate review of trial court dispositions of new trial motions for the first time, called for application of the timid abuse of discretion standard.[663] That the Court could establish such a practice at all, however, indicates that the Seventh Amendment can accommodate reassessments of the roles of judges and juries with respect to findings of fact.[664]

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657. *Id.* at 432.

658. *See id.* at 432-33. Among other things, the Court quoted *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941), to the effect that the trial court's power to set aside a jury verdict and grant a new trial "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Id.* at 433 (holding consistently with the statement of Lord Mansfield in *Bright v. Eynon*, 1 Burr. 391, 97 Eng. Rep. 365 (1757)).

659. *See id.* at 436.

660. *See id.* at 437.

661. *See id.*

662. *See id.*

663. *See id.* at 434-35. In dissent, Justice Scalia angrily insisted that appellate courts possessed no power to review motions for a new trial:

> The time to question whether orders on motions for a new trial were in fact reviewable at common law has long since passed. Cases of this Court reaching back into the early 19th century establish that the Constitution forbids federal appellate courts to "reexamine" a fact found by the jury at trial; and that this prohibition encompasses review of a district court's refusal to set aside a verdict as contrary to the weight of the evidence.

Id. at 458 (Scalia, J., dissenting).

664. *See id.* at 435.

Seventh Amendment jurisprudence demonstrates a struggle to fix the boundaries between the roles of judge and jury using both a strict historical approach and one that is less so.[665] A high point of this struggle may be seen in *Slocum v. New York Life Insurance Co.*,[666] in which a federal appellate court overturned a jury verdict and ordered the trial court to grant a judgment notwithstanding the verdict for the defendant.[667] The Supreme Court, in a 5-4 decision, held that this was inconsistent with the Court's understanding of an appellate court's power concerning a verdict at common law:

> [I]nstead of ordering a new trial, as was required at common law, the Circuit Court of Appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This we hold could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly forbids that issues of fact settled by such settled by such a trial shall be re-examined otherwise than "according to the rules of the common law."[668]

Balanced against the strict historical approach were the dissenters, speaking through Justice Hughes: "When the question is raised of invasion of the constitutional right, we must always look to the substance of what is done, and not to mere names or formal changes."[669]

The Supreme Court's struggle with the interaction between the Seventh Amendment and the power of courts concerning post-trial motions continued through most of the twentieth century. In *Dimick*

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665. *See id.* at 432-33.

666. 228 U.S. 364 (1913).

667. *See id.* at 400.

668. *Id.* at 399 (quoting U.S. CONST. amend. VII). Professor Henry Schofield vigorously supported this position, viewing an array of judge/jury relationships fixed as of 1791 as a bulwark against gradual erosion of the right to trial by jury. *See* Henry Schofield, *New Trials and the Seventh Amendment*—Slocum v. New York Life Insurance Co., 8 ILL. L. REV. 381, 382-83 (1914).

669. *Slocum*, 228 U.S. at 408 (Hughes, J., dissenting). This outlook was phrased more expansively in a critique of Professor Schofield's article by Arthur W. Spencer, who noted: "According to the rules of the common law the Seventh Amendment does not mean in absolute conformity with every technical requirement of common law pleading and practice; the phrase simply means not repugnant to the underlying principles of the common law." Arthur W. Spencer, *Superfluous New Trials and The Seventh Amendment*, 24 GREEN BAG 106, 107 (1914).

v. Scheidt,[670] the Supreme Court, on the basis of a historical analysis of English practices in 1791, held that a trial court may not condition a new trial on the refusal of the defendant to accept an additur.[671] The Court clearly viewed the particulars of English procedure as set in stone:

> [W]e are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution.[672]

This language drew a sharp rebuke from Justice Stone in dissent:

> Such a provision [the Seventh Amendment] of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the [Seventh] Amendment had an purpose but to preserve the *essentials* of the jury trial as it was known to the common law before the adoption of the Constitution.[673]

Justice Stone noted that the Court already approved of departures from English common law jury practices.[674]

In *Montgomery Ward & Co. v. Duncan*,[675] the Court approved of the grant of a judgment notwithstanding the verdict under Federal Rule 50(b) without reservation by the trial court of the question of law on a directed verdict.[676] The Court labeled this practice as an "incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution."[677] In so doing, the

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670. 293 U.S. 474 (1935).

671. *See id.* at 476.

672. *Id.* at 487.

673. *Id.* at 490 (Stone, J., dissenting) (emphasis added).

674. *Id.* at 491. Justice Stone's dissent noted this Court's approval of a federal court's use of auditors to report to the jury as an aid to its fact finding. *See Ex Parte* Peterson, 253 U.S. 300, 314 (1920). A court may also require general and special verdicts, then direct a verdict for the defendant on the basis of the facts found. *See* Walker v. New Mexico & So. Pac. R. Co., 165 U.S. 593, 598 (1897). Alternatively, a court may grant a partial new trial. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 499 (1931).

675. 311 U.S. 243 (1940).

676. *See id.* at 250.

677. *Id.*

court seemed to remain faithful to *Dimick*'s mandates to remain faithful to the common law.

Yet, in *Neely v. Martin K. Eby Construction Co.*,[678] the Court upheld the power of an appellate court to set aside a verdict and grant judgment for the other party—a procedure it had forbidden on Seventh Amendment grounds in *Slocum v. New York Life Insurance Co.*[679] In *Neely*, Justice Black based his vigorous dissent largely on his construction of Federal Rules of Civil Procedure 50(c) and (d), and not the Seventh Amendment.[680] In the post-*Beacon Theatres* era, inaugurated by Justice Black, it would have been difficult for him to argue the Seventh Amendment as an immutable bulwark against modifications of the scope of jury trial or judge/jury relations, as he had done in *Galloway v. United States*.[681]

In *Parklane Hosiery Co. v. Shore*,[682] the Court held that the finding in an earlier suit at equity could be used against the party in a later action, triable by jury, even if it involved a stranger to the first suit.[683] Such preclusion essentially deprives the party to the first suit of trial by jury as to any issues established in the suit based in equity.[684] Such preclusion was impossible in 1791 because of the rule of mutuality of estoppel.[685]

Justice Stewart, dissenter in *Beacon Theatres* and *Ross*, brushed aside the jury trial objection to the application of non-mutual collateral estoppel:

> The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment.[686]

This provoked a strong dissent from then Justice Rehnquist, who utilized a strong historical view of the Seventh Amendment, albeit one recognizing many departures from the common law rules:

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678. 386 U.S. 317, 322 (1967).
679. 228 U.S. 364 (1913).
680. *See Neely*, 386 U.S. at 340.
681. 319 U.S. 372, 396 (1943) (Black, J., dissenting); *see supra* note 21.
682. 439 U.S. 322 (1979).
683. *See id.* at 337.
684. *See id.*
685. *See id.* at 335.
686. *Id.* at 336.

> To say that the Seventh Amendment does not tie federal courts to the exact procedure of the common law in 1791 does not imply, however, that any nominally "procedural" change can be implemented, regardless of its impact on the functions of the jury. For to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.[687]

The decision in *Gasperini*, over the strong dissent of Justice Scalia,[688] indicates that those who would focus on the preservation of the substance of the right to trial by jury, rather than its eighteenth century trappings, appear dominant.

Even from an historical point of view, it is sensible not to attach too much significance to the minutiae of the eighteenth century jury trial right. According to Justice Story, the common law of England was utilized because it provided a common reservoir amidst the variations in the practices of the states.[689] English common law did not fix practices at any one point; practices evolved over time.[690] A leading scholar who has examined the historical record of the Seventh Amendment flatly stated:

> Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific "legislative history" of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment [sic], or even that it was considered at all.[691]

The development of the protective post-*Beacon Theatres* jurisprudence has demonstrated that the substance of jury trial right has been guarded, even as old trappings of the right have evolved.

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687. *Id.* at 346 (Rehnquist, J., dissenting).

688. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 449 (1996) (Scalia, J., dissenting) ("It is not for us, much less for the courts of appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlined its usefulness.").

689. *See* United States v. Wonson, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812) (Story, J., Circuit Justice).

690. *See* Morrell de Reign, *The History and Development of the Motion for New Trial and in Arrest of Judgment*, 47 AM. U. L. REV. 377, 380 (1913).

691. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 290 (1966).

Recognizing a tension between a trial court's power to grant a new trial, particularly on the basis that the verdict is against the weight of the evidence, and allowing appellate courts to review that grant in light of the jury trial right, would no doubt encumber the new trial power in a manner unknown that did not exist at common law, at whatever point the "common law" is reckoned.[692] It would entail a constitutional restriction of the equitable power to grant a new trial. It would also entail recognizing a constitutional interest in preserving the *first* verdict of a jury. This would expand the jury trial right beyond its apparent historical bounds. Such an expansion would not be generated by a threat to jury trial, such as that posed by merger, but rather a recognition of the effect of new trial on the constitutional right.

In a sense, such an evolution in the view of jury trial has already happened in both the federal system and Maryland. Both the Supreme Court and the Court of Appeals of Maryland have held that when special findings are sought by a trial judge,[693] the judge is constitutionally required to attempt to fashion equitable relief to the special verdict answers rather than make separate findings of fact. In doing so, the judge should attempt to make the findings by the jury consistent with each other and with the equitable relief ordered. This constitutional duty was established squarely in the federal courts in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*[694] and was embraced also by the Court of Appeals of Maryland in *Edwards v. Grambling Engineering Corp.*[695]

The Supreme Court in *Atlantic & Gulf Stevedore* appears to have cut this Seventh Amendment duty out of whole cloth, at least from a historical perspective. The only authority cited by the Court for the proposition was *Arnold v. Panhandle & Santa Fe Railway Co.*,[696] a brief per curiam decision which is based on the federal supremacy

692. In *Turner v. Washington Suburban Sanitary Comm'n*, 221 Md. 494, 158 A.2d 125 (1960), the historical point of reference is 1776. *See id.* at 503, 158 A.2d at 130 (citing Knee v. Baltimore City Passenger Ry. Co., 87 Md. 623, 632, 40 A. 890, 894 (1898)). In *Kann v. Kann*, 344 Md. 689, 690 A.2d 509 (1997), the historical time is fixed at 1851, the adoption of the first constitutional provision explicitly preserving the right to trial by jury in civil proceedings. *See id.* at 703, 690 A.2d 516.

693. *See* FED. R. CIV. P. 49(a); MD. R. CIV. P. 2-522(c).

694. 369 U.S. 355, 364 (1962); *see also* Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 114-15 (1963).

695. 322 Md. 535, 543, 588 A.2d 793, 797 (1991).

696. 353 U.S. 360 (1957) (per curium).

entailed in the Federal Employers Liability Act[697] rather than the Seventh Amendment.[698] Nevertheless, this duty has become a recognized aspect of Seventh Amendment jurisprudence.[699] In recognizing this duty in Maryland in *Edwards*, the court of appeals cited *Atlantic & Gulf Stevedores* rather than any precedent pertaining to such a duty in Maryland jurisprudence.[700] The recognition of this duty with respect to special verdicts is significant to the question at hand (the power of the trial judge to grant a new trial) because it involves a limitation based on the constitutional jury trial right in a realm where the trial judge has great discretion.[701] If such constitutional deference is accorded the jury's special findings, is there any reason, historical or otherwise, not to extend such deference to general verdicts as well? It is a notion well in harmony with the evolution of trial by jury in the Maryland and federal judicial systems.

IV. RECOGNITION OF THE ADVERSE EFFECTS OF THE GRANT OF NEW TRIAL ON THE RIGHT TO TRIAL BY JURY IN THE FEDERAL AND STATE COURTS

In recent times, there has been a growing recognition of the constitutional issues entailed in the grant of a new trial motion, particularly in the federal appellate courts. Most circuits have recognized these issues and in nearly every circuit, appellate courts have reversed a trial court's granting of a motion for a new trial as an infringement of the right to jury trial.[702] This is remarkable in that the power of an appellate court to review a trial court's disposition of a new trial motion was not unequivocally established in the federal courts until 1996.[703] A small number of state courts have grappled

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697. 45 U.S.C. §§ 51-60 (1994).

698. *See Arnold*, 353 U.S. at 360-61.

699. *See, e.g.*, Hiltgen v. Sumrall, 47 F.3d 695 (5th Cir. 1995).

700. *See Edwards*, 322 Md. at 543, 588 A.2d at 797 (citing Atlantic & Gulf Stevedores, Inc., 369 U.S. 355, 364 (1962)).

701. Whether the trial judge uses the special verdict at all is a matter of his or her discretion. *See* Sun Cab Co. v. Walston, 15 Md. App. 113, 161, 289 A.2d 804, 829-30 (1972), *aff'd*, 267 Md. 559, 298 A.2d 391 (1973).

702. *See infra* notes 706-822 and accompanying text.

703. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 436 (1996). In *Gasperini*, the Supreme Court addressed a trial court's denial motion for a new trial based on an allegedly excessive verdict. *See id.* at 415-16. For a discussion of *Gasperini*, see *supra* notes 649-64 and accompanying text. The Court held that such review, under an abuse of discretion standard, did not violate the Seventh Amendment's re-examination clause. *See Gasperini*, 518 U.S. at 415.

with constitutional issues implicated by the granting of a motion for a new trial, although the phenomenon is not as uniformly recent as in the federal courts.[704] The state courts that have addressed such issues squarely have not as uniformly recognized the constitutional tension between new trial and the right to jury trial as have the federal circuit courts.[705]

A. Evolving Federal Decisions

In *Marsh v. Illinois Central Railroad Co.*,[706] the trial court made a well-known statement of the traditional view of the federal trial court's scope of discretion as to a motion for a new trial: "[T]he common law power of the trial judge to grant a new trial in his discretion, irrespective of error and merely because he does not think the verdict right, is fully preserved."[707] This view was not limited to the Fifth Circuit.[708]

A seminal break with this thinking occurred in the Third Circuit in *Lind v. Schenley Industries, Inc.*[709] Here, Lind, a salaried district

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The proscription of appellate review was applied to grants of new trials as well as denials. *See, e.g.*, Portman v. American Home Prods. Corp., 201 F.2d 847, 848 (2d Cir. 1953). A leading treatise has argued that the re-examination clause is inapplicable to review of the granting of a writ for a new trial because an appellate court, by reversing the trial court, reinstates the jury's findings. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2819 (2d ed. 1993). Regardless, *Gasperini* does nothing to discourage federal appellate reversals of orders granting new trials on the basis of the size of the verdict or on the basis that the verdict is against the weight of the evidence, as this Section will demonstrate.

704. *See infra* notes 823-65 and accompanying text.

705. *See infra* notes 823-65 and accompanying text.

706. 175 F.2d 498 (5th Cir. 1949).

707. *Id.* at 499 (citing Parsons v. Bedford, 3 Pet. 433 (1830)). Interestingly, the appellate court reversed the trial court's conditional denial of a new trial. *See id.* at 500. The trial court had granted a judgment notwithstanding the verdict to the defendant and, despite its belief that the evidence was overwhelmingly against the plaintiff, denied defendant's motion for new trial on the basis that there were no other errors of law. *See id.* Because the trial court failed to exercise the full range of its discretion, the appellate court ordered it to do so. *See id.*

708. *See, e.g.*, Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941) (noting that in a motion for a new trial, the trial court may "set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.").

709. 278 F.2d 79 (3d Cir. 1960).

sales manager,[710] brought a breach of contract action against his employer.[711] He contended that the defendant orally contracted to give him one percent of the sales of the salespersons beneath him as additional compensation.[712] The jury found that the contract existed and determined its duration and terms.[713] The trial court then granted judgment notwithstanding the verdict for the defendant under former Federal Rule 50(b)[714] and conditionally granted a new trial.[715] On appeal, the Third Circuit reversed the grant of judgment notwithstanding the verdict and then turned to the granting of the new trial.[716]

The court narrowed the permissible bases for a new trial to just one: that the verdict for plaintiff was against the weight of the evidence.[717] The court conceded that the trial court's broad discretion with respect to whether the verdict is against the weight of the evidence[718] and explained that "appellate courts rarely find that the trial court abused its discretion."[719]

Notwithstanding the narrow scope of the appellate court's power in reviewing the disposition of a motion for new trial, the court sought to ascertain standards for making such review.[720] The court noted that such standards "vary according to the grounds urged in support of the new trial."[721] Recognizing that there was little authority for such standards, the court turned first to Professor

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710. *See id.*

711. *See id.* at 82.

712. *See id.*

713. *See id.* at 83.

714. *See id.* at 84. Under Federal Rules of Civil Procedure 50(b), as amended in 1993, this post verdict challenge to the sufficiency of the evidence takes the form of a renewed motion for judgment as a matter of law. *See id.*

715. *See Lind*, 278 F.2d at 84.

716. *See id.* at 87.

717. *See id.* at 87-88. The United States Court of Appeals for the Third Circuit held that the trial court's determination that the verdict was contrary to law was undone by its reversal of the judgment notwithstanding the verdict. *See id.* The trial court also granted a motion for a new trial based on an erroneous admission of evidence addressing the amount of the plaintiff's alleged damages. *See id.* at 88. The appellate court concluded that the admission of this evidence was not erroneous and therefore could not constitute the grounds for new trial. *See id.* at 88.

718. *See id.* at 88.

719. *Id.*

720. *See id.* at 89.

721. *Id.*

Moore, who took a limited view of the trial court's power to set aside a verdict:

> [S]ince the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict . . . . The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not .[722]

The court's statement that Professor Moore's views were "buttressed by *some* decisional authority"[723] was a circumlocution for one commentator's description of what the court was really doing: "The *Lind* decision far exceeds prior appellate efforts to delineate and restrict the area within which the trial judge may properly grant a new trial on the ground that the verdict is against the weight of the evidence."[724] In discerning a principled means to carry out the appellate authority it was asserting, the *Lind* court was largely in uncharted waters.[725]

The court distinguished the situation in which a new trial is considered on the basis that the verdict is against the weight of the evidence from other bases for a new trial, such as prejudicial statements, erroneous instructions, or newly discovered evidence.[726] The rationale for this distinction was that, as to bases for new trial other than when the verdict is against the weight of the evidence:

> [S]omething occurred in the course of the trial which resulted or which may have resulted in the jury receiving a

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722. *Id.* (quoting 6 JAMES W. MOORE ET AL., MOORE'S FED. PRAC. § 3819 (1948)).

723. *Id.* (emphasis added) (citing Werthan Bag Corp. v. Agnew, 202 F.2d 119, 122 (6th Cir. 1953)).

724. Note, *Civil Procedure: Power of Trial Judge to Grant New Trial Where Verdict is Against Weight of the Evidence*, 1961 DUKE L.J. 308, 311 (1961).

725. *See id.*

726. The Court of Appeals of Maryland has implicitly recognized such a distinction. *See* Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 59, 612 A.2d 1294, 1298 (1992). In *Buck*, the court explained that in considering whether a verdict is against the weight of the evidence, "the range of discretion of the trial judge [is] necessarily at its broadest." *Id.* This is true even though the court's description of this standard, abuse of discretion, is nominally the same as that applicable to other bases for a new trial. *See, e.g.*, Medical Mutual Liab. Ins. Soc. of Maryland v. Evans, 330 Md. 1, 19, 622 A.2d 103, 111-12 (1993) (addressing a motion for a new trial based on unfairly prejudicial attorney misconduct). For a discussion of *Medical Mutual Liability Insurance Society of Maryland*, see *supra* notes 90-124 and accompanying text.

> distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.[727]

When a judge sets aside a verdict that is the product of deliberations untainted by influences not created by the jury itself, such action entails the judge "substitut[ing] his judgment of the facts and the credibility of the witnesses for that of the jury."[728] Therefore, the court explained: "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts."[729] The potential of such usurpation, according to the *Lind* court, warrants a closer degree of appellate supervision over the trial court "to protect the litigant's right to jury trial."[730]

The court stated that a trial judge should be given greater latitude with respect to new trial "[w]here a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors."[731] The court regarded the subject matter of the dispute involved therein as "simple and easily comprehended by any intelligent layman."[732] Thus, the court concluded that the trial court had substituted its judgment for that of the jury, thereby constituting an abuse of discretion.[733]

The court in *Lind* undertook to restrict the trial court for much the same reason that courts restrict expert testimony as to matters that may better be decided on the basis of common knowledge or common sense[734]—to prevent an invasion of the province of the jury. The contention in the dissent by Judge Hastie mirrors to some extent the justification for expert testimony:

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727. *Lind*, 278 F.2d at 90.

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.* The court used the example of a patent case concerning a possible infringement regarding a potential newly discovered organic compound. *See id.* at 91.

732. *Id.* at 91.

733. *See id.*

734. *See* Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941) (citing Consolidated Gas Elec. Light & Power Co. v. State, *ex rel.* Smith, 109 Md. 186, 203, 72 A.2d 651, 658 (1909) (holding that expert testimony is not admissible when the jury can decide for itself)).

> The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what *in his professionally trained and experienced judgment* is an unjust verdict by vacating it and causing the matter to be tried again by a second jury.[735]

Judge Hastie's dissent views the potential usurpation of trial by jury through the trial judge's power to grant a new trial in much the same way as did Blackstone. There is no usurpation because the grant of a new trial is followed by a better trial, also before a jury.[736] The majority in *Lind*, however, implicitly initiate the development of a notion that a more important component of the right to jury trial than obtaining the "best" result is to preserve, if possible, the first result.[737]

In *Berner v. British Commonwealth Pacific Airlines, Ltd.*,[738] the United States Court of Appeals for the Second Circuit examined the conditional grant of a new trial in favor of a plaintiff.[739] To avoid a severe limitation on damages under the Warsaw Convention,[740] the plaintiff had to prove willful misconduct by the air carrier to recover for a plane crash in which his decedent was killed.[741] The jury found that the plaintiff had not done so.[742] The trial court granted judgment notwithstanding the verdict for the plaintiff and granted a new trial conditionally in the event of a reversal of the judgment notwithstanding the verdict.[743] The Second Circuit reversed the trial court on both the judgment and grant of motion for a new trial.[744]

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735. *Lind*, 278 F.2d at 91 (Hastie, J., dissenting) (emphasis added).

736. *See* 3 BLACKSTONE, *supra* note 7, at 391.

737. A more recent statement of the Third Circuit standard is that "'new trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.'" Wilburn v. Maritrans GP Inc., 139 F.3d 350, 364 (3d Cir. 1998) (quoting Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991)).

738. 346 F.2d 532 (2d Cir. 1965).

739. *See id.* at 534.

740. *See id.* (citing Convention and Additional Protocol with Other Powers Relating to International Air Transportation, October 12, 1929, 49 Stat. 3000, 3019 (1934)).

741. *See id.*

742. *See id.*

743. *See id.*

744. *See id.* at 542.

Regarding the new trial, the court took an interesting approach. Rather than invoking the usual incantation about the abuse of discretion standard, the court observed that "[t]o order a new trial [on the basis that the verdict is against the weight of the evidence] when there was sufficient evidence to go to the jury, [there] *need not be an abuse of discretion in every case.*"[745] In light of the nature of the issues and evidence,[746] the court reversed the grant of the new trial.[747]

Although the court did not explain its rationale as fully as the *Lind* court, its action was remarkable in its own right. The court appears to have enunciated a strong presumption, enforceable by appellate reversal, for upholding a jury determination when there is enough evidence to create a jury issue.[748] The court made no mention at all of what had been nearly an impenetrable wall of judicial discretion with respect to new trial.[749] Although the court's rationale was somewhat cryptic, over time the Second Circuit's standard on the issue of grant of a new trial evolved to the view that "[t]he district court's grant of a new trial motion is usually warranted only if it 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.'"[750]

Although the court in *Duncan v. Duncan*[751] acknowledged that "[t]here are few cases where an appellate court has reversed a decision of a district court in either granting or denying a motion for a new trial" based on the weight of the evidence,[752] the Sixth Circuit, building on *Lind* and *Berner*, did precisely that.[753] In *Duncan*, a car's

745. *Id.* at 541 (citing 6 JAMES W. MOORE, MOORE'S FED. PRAC., § 59.08(5) (2d ed. 1953) (emphasis added)).

746. Whether the pilot had engaged in wilful misconduct depended on whether he had received proper signals for clearance for descent. *See Berner*, 346 F.2d at 537-38. The plaintiffs asserted that the signals were working properly and thus, the pilot had not received such clearance. *See id.* at 538. Viewing resolution of the issue as dependent on inferences from circumstantial evidence, the court of appeals concluded: "One can hardly imagine a clearer case in which such questions should have been left to the jury." *Id.* (citing LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 271 (2d Cir. 1965)).

747. *See id.* at 542.

748. *See id.* at 538.

749. *See, e.g.*, Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485 (1933).

750. Sorlucco v. New York City Police Dep't, 971 F.2d 864, 875 (2d Cir. 1992) (quoting Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 370 (2d Cir. 1988)).

751. 377 F.2d 49 (6th Cir. 1967).

752. *Id.* at 53.

753. *See id.* at 50.

passengers brought suit against a driver in a one-vehicle accident.[754] There was evidence tending to show that the driver was operating at a speed too fast for the weather and road conditions, but there was no evidence why the vehicle went out of control.[755] The jury returned a verdict for the defendant and the trial court granted a motion for a new trial noting:

> But, I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence .[756]

The appellate court recognized the scope of discretion of the trial judge on a motion for new trial but looked to the Supreme Court to support the notion that trial courts may not set aside a verdict "because judges feel that other results are more reasonable."[757]

The court looked to *Berner* to illuminate the well-established principle that when a case goes to the jury, the verdict should not be set aside if reasonable persons could find in favor of the party who won the verdict.[758] The court also accepted *Lind*'s distinction between complicated and simple cases for purposes of a trial court's discretion on a new trial motion,[759] noting that the *Duncan* trial had lasted less than two days.[760] It agreed with the defendant that the case was a "prime example of subject matter lying well within the comprehension of jurors."[761] The court thus vacated the grant of a new trial and the verdict the plaintiff won in the second trial.[762]

In *Fireman's Fund Insurance Co. v. AALCO Wrecking Co., Inc.*,[763]

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754. *See id.* at 50-51. The defendant driver was married to one of the passengers and there was significant evidence that the driver's wife, a plaintiff, was actually driving. *See id.* at 51.

755. *See id.*

756. *Id.* at 52.

757. *Id.* (quoting Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35 (1944)).

758. *See id.* at 53 (quoting Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 538 (2d Cir. 1965)). For a discussion of *Berner*, see *supra* notes 738-750 and accompanying text.

759. *See id.* at 54. For a discussion of *Lind*, see *supra* notes 709-37 and accompanying text.

760. *See id.* at 55.

761. *Id.*

762. *See id.*

763. 466 F.2d 179 (8th Cir. 1972).

the United States Court of Appeals for the Eighth Circuit considered whether insurance companies could recover in a subrogation action against a wrecking company for losses arising from a warehouse fire.[764] The trial court granted the defendant's motion for a new trial.[765] Building on *Lind*, *Berner*, and *Duncan*, the court held that:

> Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not.[766]

The *Fireman's Fund* court introduced a new rationale for the emboldened appellate review of trial court discretion that had been developing judicial economy.[767] It viewed the state of the evidence as one on which reasonable persons might differ as to liability.[768] On such a record, the court observed:

> We are hard pressed to say that a miscarriage of justice has taken place in the first trial. We cannot approve under the existing circumstances another time-consuming and costly trial without better justification on the record. All courts should be sensitive to and reasonably avoid crowded dockets.[769]

Two judges of the circuit strongly dissented from denial of rehearing en banc.[770]

They emphasized the state of Supreme Court precedent with

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764. *See id.* at 181.
765. *See id.* at 185-86.
766. *Id.* at 187.
767. *See id.* at 188.
768. *See id.* at 187.
769. *Id.* at 188.
770. *See id.* (Mehaffy, J., dissenting). The dissenters noted:

> The only sure way to prevent a miscarriage of justice in this case is to grant the rehearing and sustain the trial court's order granting a new trial. This is a complicated case with a lengthy record and it clearly requires something more than a weighing of the evidence when the trial court has concluded that it mistakenly admitted testimony which could well have influenced the jury.

Id. at 190 (Mehaffy, J., dissenting).

respect to the trial court's discretion on a new trial motion[771] and rebuked straightforwardly the judicial economy rationale of the court's opinion:

> If we must follow the panel's new rule, it will place this court in the role of trying cases de novo for which we are not and cannot be equipped. Furthermore, this new appellate capacity threatens to erode the fact-finding responsibility of the district courts.[772]

When granting a motion for new trial based on the weight of the evidence, the Eighth Circuit provided that a trial court must "articulate reasons supporting the judge's view that a miscarriage of justice has occurred."[773] Once the trial court has done so, its determination that the verdict is against the weight of the evidence "is entitled to great deference and is reversible only upon a strong showing of abuse."[774]

In *Taylor v. Washington Terminal Co.*,[775] the District of Columbia Circuit considered the Seventh Amendment implications posed by the trial court's granting of a motion for a new trial conditioned on the plaintiff's acceptance of a remittitur.[776] Once the jury found the defendant railroad liable for the plaintiff's personal injuries under the Federal Employer's Liability Act ("FELA"),[777] the trial court granted the defendant's motion for a new trial so long as the plaintiff would not accept a remittitur of $60,000.[778] The plaintiff refused, and the second jury awarded $25,000.[779] The appellate court balanced the "judge's unique opportunity to consider the evidence in

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771. *See id.* at 189 (Mehaffy, J., dissenting) (citing Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967); Neese v. Southern Ry. Co., 350 U.S. 77 (1955); United States v. Johnson, 327 U.S. 106 (1946); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933)).

772. *Id.* at 190 (Mehaffy, J., dissenting).

773. King v. Davis, 980 F.2d 1236, 1237 (8th Cir. 1992) (citing White v. Pence, 961 F.2d 776, 780-82 (8th Cir. 1992)).

774. *Id.* The Eighth Circuit has observed more recently that when the size of the verdict is the basis for a new trial, its review is "extraordinarily deferential." Sanford v. Crittenden Mem'l Hosp., 141 F.3d 882, 884 (8th Cir. 1998).

775. 409 F.2d 145 (D.C. Cir. 1969).

776. *See id.* at 146.

777. 45 U.S.C. §§ 51-60 (1964).

778. *See Taylor*, 409 F.2d at 146.

779. *See id.*

the living courtroom"[780] with the role of the jury as "the agency to whom the Constitution allocates the fact-finding function in the first instance."[781] It noted that the district judges in the circuit had already observed that a new trial would not be granted on the basis of excessiveness unless it is "'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.'"[782] The court stated that it would reverse the grant of a new trial based on excessive damages only where the amount of "damages found by the jury was *clearly* within the maximum limit of a reasonable range."[783] The court thus set aside the verdict of a second trial and ordered reinstatement of the plaintiff's first verdict.[784]

In *Spurlin v. General Motors Corp.*,[785] the trial court awarded damages to a parent whose child was killed allegedly due to the defendant's braking system.[786] The trial court set aside the jury verdict for the plaintiff on a motion for judgment notwithstanding the verdict and, in the alternative, on a motion for a new trial.[787] The United States Court of Appeals for the Fifth Circuit viewed the Seventh Amendment as expressing a principle that "facts once found by a jury in the context of a civil trial are not to be reweighed and a new trial granted lightly."[788] In light of that principle, it enunciated a standard that the district court should not grant a new trial motion unless the jury verdict is "at least . . . against the *great* weight of the evidence."[789]

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780. *Id.* at 148.

781. *Id.*

782. *Id.* at 149 (quoting Graling v. Reilly, 214 F. Supp. 234, 235 (D.D.C. 1963)). A similar test has been adopted by the Fifth Circuit. *See, e.g.*, Brun-Jacobo v. Pan American World Airways, Inc., 847 F.2d 242 (5th Cir. 1988).

783. *Taylor*, 409 F.2d at 149 (internal quotation marks omitted).

784. *See id.*

785. 528 F.2d 612 (5th Cir. 1976).

786. *See id.* at 614.

787. *See id.*

788. *Id.* at 620.

789. *Id.* (quoting Cities Serv. Co. v. Launey, 403 F.2d 537, 540 (5th Cir. 1968)); *see also* Peterson v. Wilson, 141 F.3d 573, 577 (5th Cir. 1998) (noting that there is a well-established principle that a verdict can be against the great weight of the evidence, and therefore grounds for new trial, even though there is substantial evidence to support it). The Ninth Circuit has adopted a similar test – a new trial may not be granted unless the verdict is clearly contrary to the weight of the evidence. *See, e.g.*, William Ingliss & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1980). Likewise, the Federal Circuit has noted that "[a] new trial is warranted if the verdict is against the

In *Williams v. City of Valdosta*,[790] the Eleventh Circuit reversed the alternative granting of a motion for a new trial.[791] Here, a firefighter brought action under 42 U.S.C. section 1983 against the municipality for alleged retaliatory action as a result of his protected First Amendment activity.[792] After the plaintiff began unionizing the firefighters and filing a number of personnel grievances, the city abolished his captaincy and demoted him to lieutenant.[793] The city contended that its action was in response to a fiscal crisis and that the action saved the city $1,700.[794] There was ample evidence that the economy rationale was pretextual, and the jury found in favor of the plaintiff.[795]

The appellate court, on reviewing the evidence, found that there was "'no great weight of the evidence in any direction.'"[796] The court held that granting a new trial in such circumstances was an abuse of discretion.[797] The court acknowledged that the abuse of discretion standard applies whether a trial court grants or denies a new trial motion, but emphasized that when a trial court grants the motion based on insufficiency of the evidence, it is more likely to have abused its discretion, at least when all of the evidence is properly before the jury and the proceedings have been decorous.[798] The court underscored that "fact-finding is the province of the jury."[799]

'clear or great weight of the evidence.'" Motorola, Inc. v. Interdigital Tech. Corp., 121 F.3d 1461, 1470 (Fed. Cir. 1997). However, the court employs the abuse of discretion standard of review and it is not clear from the court's decisions that the grant of a new trial on a showing lower than against the clear or great weight of the evidence would be reversed as an abuse of discretion. *See* Oiness v. Walgreen Co., 88 F.3d 1025 (Fed. Cir. 1996).

790. 689 F.2d 964 (11th Cir. 1982).

791. *See id.* at 966. The trial court also granted judgment notwithstanding the verdict for the defendant, which the appellate court also held to be erroneous. *See id.* at 972-73.

792. *See id.* at 966.

793. *See id.* at 966-68.

794. *See id.* at 968.

795. *See id.*

796. *Id.* at 976 (quoting Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360, 367 (5th Cir. 1980)).

797. *See id.*

798. *See id.* at 973-76.

799. *Id.* at 974, n.8; *see also* Carter v. Decisionone Corp., 122 F.3d 997, 1004 (11th Cir. 1997) (noting that a jury verdict is not to be disturbed unless it is against the great weight of the evidence); Hardin v. Hayes, 52 F.3d 934, 938 (11th Cir. 1995) (observing that the trial court's discretion to set aside a jury verdict is narrowed when the court contends it is against the great weight of the evi-

In *Coffran v. Hitchcock Clinic, Inc.*,[800] the First Circuit assessed the trial court's granting of a motion for a new trial in a medical malpractice action following a defendant's verdict,[801] holding that the trial court abused its discretion.[802] This decision is significant because it involved setting aside the trial judge's assessment of rather complex medical testimony.[803] Ultimately, whether there was actionable negligence depended upon whether a particular test, which the doctor did not perform, would have warned the doctor not to use the anesthetic that allegedly injured the plaintiff.[804] The trial court concluded that the defendant's verdict "was contrary to the clear weight of the evidence and . . . if allowed to stand, would constitute a patent and grave miscarriage of justice."[805]

The appellate court's decision was ultimately based on its view that the jury's belief of the defendant's expert on the question of whether the omitted test would have prevented the harm to the patient did not demonstrate that the jury was "seriously mistaken." Thus, the jury's finding was not against the clear weight of the evidence.[806] The court noted the "modern trend" with respect to review of the grant of new trials on the basis that the verdict is contrary to the great weight of the evidence.[807] It described the direction of this trend in a way it had not been described before: "[T]he trial judge's discretion, although great, must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial."[808]

The court relied upon *Lind* for this proposition, but *Lind* and other cases[809] held that a trial judge may exercise greater scrutiny of

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dence).

800. 683 F.2d 5 (1st Cir. 1982).

801. *See id.* at 6.

802. *See id.* at 11. The United States Court of Appeals for the First Circuit remanded, with instructions that judgment be entered in the favor of the defendant. *See id.*

803. *See generally id.* at 8-11 (providing the contradictory and complex evidence presented at trial).

804. *See id.* The United States Court of Appeals for the First Circuit indicated that the failure to perform the eosinophil test constituted negligence; however, the question as to whether the test would have warned of the potential for the plaintiff to contract hepatitis was not considered. *See id.* at 10.

805. *Id.* at 7 (internal quotation marks omitted).

806. *See id.* at 11.

807. *See id.* at 6.

808. *Id.*

809. *See, e.g.*, Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982).

the jury "[w]here a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors."[810] *Coffran* involved an 11-day trial and a great deal of complex and conflicting medical testimony.[811] In limiting the discretion of the trial court, *Coffran* ventures beyond any other decision.

Not all circuits have restricted the discretion of a trial court in granting a new trial in the manner of *Lind* and its progeny. For example, both the Fourth[812] and the Tenth Circuits appear to apply the traditional abuse of discretion standard that does not differentiate between the grant and denial of the motion for new trial.[813] Both have reversed new trial grants, but they have done so in circumstances that do not necessarily indicate adherence to *Lind* or its progeny.[814]

The Seventh Circuit, which had restricted the trial court in granting a new trial on the weight of the evidence to circumstances when the verdict was against the clear weight of the evidence,[815] has now embraced a standard which gives more discretion to the trial judge.[816] In relaxing restrictions on the trial court, the Seventh Circuit relied on the Supreme Court's opinion in *Gasperini v. Center for Humanities, Inc.*,[817] which in the words of the court in *Medcom Hold-*

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810. Lind v. Schenley Indus. Inc., 278 F.2d 79, 90 (3d Cir. 1960).

811. *See generally Coffran*, 683 F.2d at 6-11.

812. *See* Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985).

813. *See, e.g., id.* at 168; Mayhue v. St. Francis Hosp. of Wichita, 969 F.2d 919, 922 (10th Cir. 1992).

814. For example, in *Massey-Ferguson Credit Corp. v. Webber*, 841 F.2d 1245 (4th Cir. 1988), the court reversed successive grants of new trial that resulted in three trials and reinstated the verdict of the first trial. *See id.* at 1246. The court applied what it perceived to be a rule against setting aside successive verdicts in anything other than the most exceptional cases. *See id.* at 1250. In *Wilson v. Burlington Northern R.R. Co.*, 804 F.2d 607 (10th Cir. 1986), the court reversed grant of a new trial in a case under FELA. *See id.* at 608. The court's action was based on the repeated Supreme Court admonitions in the context that "trial courts not substitute their judgment for that of the jury." *Id.* at 610 (citing Davis v. Baltimore & Ohio R.R. Co., 379 U.S. 671 (1965) (per curiam); Basham v. Pennsylvania R.R. Co., 372 U.S. 699 (1963) (per curium)). Thus, the court's holding does not appear to have applicability outside the FELA setting.

815. *See* Superbird Farms, Inc. v. Perdue Farms, Inc., 970 F.2d 238, 249 (7th Cir. 1992).

816. *See* Medcom Holding Co. v. Baxter Tavernol Labs., Inc., 106 F.3d 1388, 1397 (7th Cir. 1997).

817. 518 U.S. 415 (1996).

ing Co. v. Baxter Tavernol Labs., Inc.,[818] "held that an abuse of discretion standard of review [did] not violate the Seventh Amendment."[819]

The Seventh Circuit's use of *Gasperini* in this way represents a misapplication of the Supreme Court's holding. The Court's reference to the abuse of discretion standard referred to application of such a standard by an *appellate* court in light of the Seventh Amendment's re-examination clause.[820] The qualms discouraging the granting of a motion for a new trial on the right to trial by jury do not pertain to the re-examination, or second, clause of the Seventh Amendment, but, rather, to the first clause, which preserves the right to trial by jury.[821] *Gasperini* did not grant more latitude to federal trial courts to apply the abuse of discretion standard then they had before. The Seventh Circuit, on the basis of Supreme Court precedent, is free to give the trial court as much discretion in granting a new trial as in denying one. Such an approach, however, has become a distinctly minority view.[822]

Notwithstanding the Seventh Circuit's apparent return to a more traditional appellate review of the granting of a motion for a new trial, some generalizations may be made about the development of a prevalent, stricter standard. Such a standard distinguishes between the grant and denial of a motion for a new trial, with the former subject to more rigorous appellate scrutiny. Further, the standard distinguishes between the granting of a new trial on the basis of the weight of the evidence (including contentions of exces-

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818. 106 F.3d 1388 (7th Cir. 1997).

819. *Medcom Holding Co.*, 106 F.3d at 1397 (citing *Gasperini*, 518 U.S. at 533-34).

820. *See Gasperini*, 518 U.S. at 432. The question in *Gasperini* as to appellate jurisdiction was whether there could be any review of whether a verdict was excessive by an appellate court consistent with the Seventh Amendment's re-examination clause. *See id.* Indeed, the Court imposed a more stringent standard of review upon the trial court under New York law under the command of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See Gasperini*, 518 U.S. at 430-31, 448.

821. The *Gasperini* Court acknowledged that it had long been understood that a trial judge's power to set aside a verdict does not run afoul of the re-examination clause. *See id.* at 417.

822. It is possible that the Seventh Circuit does not stand completely alone in its use of *Gasperini*. *See* Kelley v. Airborne Freight Corp., 140 F.3d 335 (1st Cir. 1998). In *Kelley*, the United States Court of Appeals for the First Circuit, in reviewing a trial court's denial of a new trial, cited *Gasperini* as allowing a trial court to grant a new trial if the verdict is against "the weight of the evidence." *Id.* at 355 (quoting *Gasperini*, 518 U.S. at 433).

siveness or inadequacy of the amount of the verdict) and all other traditional bases for granting a new trial. Finally, the stricter standard requires some specific quantum by which the verdict must be against the weight of the evidence, ranging from the clear or great weight of the evidence to a serious miscarriage of justice. This standard is harder to meet in cases in which the trial is relatively short or the subject matter uncomplicated.

In light of these developments, it is more difficult than it was a generation ago to posit that there is no constitutional affront to trial by jury in a court's granting of a new trial because, after all, such an order simply brings about another jury trial. The notion that the Seventh Amendment entails a right to some extent to judicial sustaining of the first jury verdict would, of course require approval by the Supreme Court, which has not yet considered the issue.

B. New Trial and the Right to Trial by Jury in State Courts

Surprisingly few states have explicitly examined a trial court's power to grant a motion for a new trial as a potential threat to the right to trial by jury. This stems from the notion that the impact of granting such a motion "is to send the case to a second jury."[823] The potential that a verdict may be set aside by the grant of a new trial has been seen as a concomitant of the right to jury trial,[824] for as the Supreme Court of Washington observed: "The right of a trial judge to set aside a verdict if he believes that substantial justice has not been done is probably as old as the jury system itself."[825] The state courts that have addressed the interplay between the right to a jury trial and the motion for a new trial have expressed some reservations about unfettered trial courts. Reversing a trial court's refusal to grant a new trial, the Supreme Court of Iowa noted:

> It is true trial courts have wide judicial discretion in the granting of a new trial but they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of a jury fails to administer substantial justice and that this Court is more reluctant to interfere where a new trial is granted than where it is denied.[826]

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823. FRIEDENTHAL, *supra* note 4, § 12.4.

824. *See id.* § 12.4.

825. Bond v. Ovens, 147 P.2d 514, 515 (Wash. 1944).

826. Feldhahn v. Van Deventer, 115 N.W.2d 862, 864 (Iowa 1962). This greater lati-

The Supreme Court of Illinois has also stated a view of the trial court's discretion concerning the verdict and weight of the evidence that is distinctly non-deferential to the jury:

> The Constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of evidence, and, if a verdict is manifestly against the weight of the evidence, it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed.[827]

In the majority of jurisdictions adhering to views similar to that of the Illinois Supreme Court, there are few reversals of orders granting new trials.[828]

A small number of states have restricted the trial court's power to grant a new trial to protect trial by jury—much like *Lind* and its progeny. In *Hammond v. City of Gadsden*,[829] for example, a widow of a retired municipal employee whose medical insurance was to end after her husband died sued the municipality and a municipal entity for fraud, breach of contract, and negligent misrepresentation.[830]

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tude concerning the grant of a new trial is contrary to the recent tendency in the federal circuit courts to exercise more scrutiny with respect to the granting of a motion for a new trial. *See, e.g.*, Lind v. Schenley Indus., Inc., 278 F.2d 79, 90-99 (3d Cir. 1960). For a discussion of *Lind*, see *supra* notes 709-37 and accompanying text.

827. Donelson v. East St. Louis & Suburban Ry., 85 N.E. 914, 915-16 (Ill. 1908) (citing Lincoln v. Stowell, 62 Ill. 84, 86 (1871); Chicago, Burlington & Quincy R.R. v. Gregory, 58 Ill. 272, 277 (1871); Henry v. Eddy, 34 Ill. 508, 515-16 (1864)).

828. *See* Ronald L. Hamm, Comment, *New Trials and the Need for Uniformity in Standards*, 2 J. MARSHALL J. OF PRAC. & PROC. 158 (1968). The provision of New York law at issue in *Gasperini* required the appellate division to "'determine that an award is inadequate or excessive if it deviates materially from what would be reasonable compensation.'" *Gasperini*, 518 U.S. at 418-20 (quoting N.Y. CIV. PRAC. LAW AND RULES 5501(c) (McKinney 1995)). This provision indirectly requires trial courts to scrutinize jury verdicts more closely. *See, e.g.*, Inya v. Ide Hyundai, Inc., 619 N.Y.S.2d 440, 440 (N.Y. App. Div. 1994) (holding that jury verdict's failure to "shock the conscience" should not have precluded trial court's granting the plaintiff's motion to set aside the verdict).

829. 493 So. 2d 1374 (Ala. 1986).

830. *See id.* at 1375-76. The plaintiff believed that the insurance plan, which had been transferred from the City of Gadsden to a self-insurance plan, would cover her medical insurance, notwithstanding the new plan's provisions. *See id.*

The jury awarded the plaintiff $12,000.[831] In reviewing the trial court's remittitur, the appellate court considered the city's assertion that the plaintiff's medical expenses during the period of the interruption of her coverage were no more than $2,200 in excess of premiums she would have paid had her coverage remained in effect.[832] The trial court remitted all but $2,000 of the jury's award.[833]

The Alabama Supreme Court reversed and remanded,[834] holding that a jury verdict may be disturbed in only limited circumstances—if it "is excessive because it is the result of passion, bias, corruption or other improper motive, [or if it includes or excludes] a sum which is clearly recoverable or not as a matter of law,"[835] or which is totally unsupported by the evidence.[836] As to the apparent discrepancy between the plaintiff's recovery and her computable damages, the court explained that "[a] trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff."[837]

The court recited the incantation of the trial court's "advantage of observing all of the parties to the trial,"[838] but indicated that this creates a duty on the part of trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages."[839] The court suggested that when determining whether the verdict was justified, the trial court should consider the defendant's culpability, the desirability of discouraging others from such conduct, and the impact of the defendant's conduct on the parties.[840] The limitation of the trial

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831. *See id.* at 1376.

832. *See id.* at 1378.

833. *See id.*

834. *See id.* at 1379.

835. *Id.* at 1378.

836. *See id.* As to whether a contention is totally unsupported by the evidence, it must be borne in mind that Alabama resolutely clings to the scintilla rule—that an issue must be submitted to the jury if "the evidence, or any reasonable inference therefrom, produces the merest gleam, glimmer, or spark in support of the theory of the complaint." Handley v. City of Birmingham, 475 So. 2d 1185, 1186 (Ala. 1985) (citing Quillen v. Quillen, 388 So. 2d 985 (Ala. 1980)).

837. *Hammond*, 493 So. 2d at 1379 (citing B&M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979); Vest v. Gay, 154 So. 2d 298 (Ala. 1937)).

838. *Id.* at 1379.

839. *Id.*

840. *See id.* Under the circumstances, this amounted to an invitation to the trial court to fashion an award of punitive damages to preserve the verdict or to justify why it did not do so. Such a process would probably not be permissible

court's discretion regarding the size of the verdict and the requirement that the trial court preserve the factors considered in either granting or denying a motion for new trial were imposed with an eye to the constitutional requirement that "a jury verdict may not be set aside unless [it] is flawed, thereby losing its constitutional protection."[841]

In *Colorado Springs & Interurban Railway Co. v. Kelley*,[842] the Colorado Supreme Court displayed a similarly strong regard for the province of the jury. Here, the plaintiff won a personal injury verdict against a tramway company in the amount of $17,000.[843] The defendant argued that the verdict was excessive.[844] Approving the trial court's refusal to set aside the verdict, the court noted:

> It may seem to be a large amount, perhaps larger than the average in similar cases, though it does not stand out as an exception, nor even unusual. It may have been greater than the trial court would have awarded, or greater than this court would have felt justified in giving. But the power to make the award was within the *constitutional* and *exclusive province of the jury*, and courts may not invade that power, nor disturb it, except for injustice manifestly appearing.[845]

This language is reminiscent of some federal decisions following *Lind*.[846] Connecticut also has sharply limited the discretion of a trial

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under Maryland law. *See* Scott v. Jenkins, 345 Md. 29, 35-37, 690 A.2d 1000, 1007-08 (1997) (holding that to recover punitive damages, facts sufficient to show actual malice had to be pleaded and proven by clear and convincing evidence, and specific demand for recovery of punitive damages had to be made); *see also* Owens-Illinois v. Zenobia, 325 Md. 420, 469, 472, 601 A.2d 633, 657, 659 (1992) (holding that the clear and convincing evidence standard was applicable in assessment of punitive damages in any tort case).

841. *Hammond*, 493 So. 2d at 1378. The court delineated the two ways in which a jury verdict may be flawed as: 1) including or excluding a sum which, as a matter of law, is either recoverable, not recoverable, or totally unsupported by the evidence, or 2) because it results from bias, passion, prejudice, corruption, or other improper motive rather than from the evidence and applicable law. *See id.*

842. 176 P. 307 (Colo. 1920).

843. *See id.* at 308.

844. *See id.*

845. *Id.* at 309-10 (emphasis added).

846. *See, e.g.*, Sorlucco v. New York City Police Dep't, 971 F.2d 864 (2d Cir. 1992) (finding that the trial court overstepped its bounds and usurped the jury's function of judging credibility in granting a new trial).

judge in granting a new trial, as its state's supreme court has observed:

> One obviously immovable limitation on the legal discretion of the court in such cases is the constitutional right of trial by jury, which in a proper case includes the right to have issues of fact, as to the determination of which there is room for a reasonable difference of opinion among fair-minded men, passed upon by the jury and not by the court.[847]

This principle was applied more recently by Connecticut's intermediate court in setting aside a trial court's grant of the plaintiff's motion for a new trial conditioned upon the defendant's rejection of an additur in *Shea v. Paczowski*.[848] The court brushed aside the trial judge's recital in his memorandum of decision that a juror appeared to be asleep during damage instructions.[849] The court commented that: "Only under the most compelling circumstances may the court set aside a jury verdict because to do so interferes with a litigant's constitutional right in appropriate cases to have issues of fact decided by a jury."[850]

The *Shea* court concluded that nothing in the evidence supported the trial court's conclusion that the jury's award "did not fall somewhere between the necessarily uncertain limits of just damages" or was influenced by partiality, prejudice, mistake, or corruption.[851] Such a standard clearly is tolerant of a great deal of uncertainty as part of the constitutional jury trial right.

Furthermore, the Supreme Court of Florida has held that the constitutional right to trial by jury entitles the parties to a lawsuit to have verdicts in their favor given effect "unless some clear, lawful reason is made to appear why a particular verdict should be set aside and a new trial had."[852] In *Hawk v. Seaboard System Railroad, Inc.*,[853] Florida's intermediate court set aside the trial court's grant of a motion for a new trial conditioned on remittitur. The trial

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847. Robinson v. Backes, 99 A. 1057, 1058 (Conn. 1917).

848. 526 A.2d 558 (Conn. 1987).

849. The court noted that neither the trial court nor the plaintiff took action at the time. *See id.* at 559.

850. *Id.* (citing Bambus v. Bridgeport Gas Co., 169 A.2d 265 (Conn. 1961)).

851. *Id.* at 560.

852. Duboise Constr. Co. v. City of South Miami, 146 So. 833, 835 (Fla. 1933) (reversing an order granting a new trial where it plainly appeared that the verdict was the result of a fair trial).

853. 547 So. 2d 669 (Fla. Dist. Ct. App. 1989).

court ordered a remittitur or new trial with respect to wrongful death verdicts in favor of the parents of two children.[854] Reversing the trial court's action as an abuse of discretion, the court noted that "the trial court does not sit as a seventh juror with veto power and may not substitute its judgment on damages" for that of the jury.[855] The court commented that the trial court, by setting aside a verdict as excessive, must support its conclusion with specific findings that the verdict is against the manifest weight of the evidence.[856] The court further observed that "[w]here the evidence is conflicting, the weight to be given to that evidence is in the province of the jury."[857]

Among the states, Oregon has provided the strongest bulwark for its constitutional right to trial by jury against infringement by the granting of a motion for a new trial. Its constitution forbids the granting of a new trial in a jury case unless there is no evidence to support the verdict.[858] This provision essentially strips trial courts of the power to grant a new trial in cases in which there is a jury question.[859] Its inflexibility enables the constitutional prohibition to be a mechanism of injustice, requiring that grossly excessive or inadequate verdicts be sustained.[860]

Constitutional restrictions and appellate court deference are not the only avenues pursued by states in protecting the right to a jury trial. Four states prevent trial courts by statute from granting more than two new trials in the same case.[861] Some states, however,

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854. *See id.* at 671.

855. *Id.* (citing Laskey v. Smith, 239 So. 2d 13 (Fla. 1970)).

856. *See id.* (citations omitted).

857. *Id.* In a concurring opinion, Judge Altenbernd suggested that the defendant might better have settled the case. *See id.* at 674 (Altenbernd, J., concurring). The plaintiffs' children were killed when the automobile their mother was driving was struck by a train. *See id.* (Altenbernd, J., concurring). Judge Altenbernd speculated that the size of the verdict may have been caused by the jury's negative reaction to the attempt of the defendant to cast blame on the mother. He warned that a defendant may not depend on a new trial to limit the risk of litigating unless the verdict is "so inordinately large as to obviously exceed" the risk. *Id.* (Altenbrand, J., concurring).

858. *See* OR. CONST., art. VII § 3 (amended 1996).

859. *See* Williams v. Clemen's Forest Prods., Inc., 217 P.2d 252, 254 (Or. 1950) (holding that where jury had determined an issue of fact and there was evidence to support their finding, the Supreme Court could not re-examine the issue).

860. *See id.*

861. *See* ALA. CODE § 6-8-104 (1993) ("No more than two new trials can be granted the same party on any cause of action."); TENN. CODE ANN. § 27-2-101 (1980)

base their limitations on judicial economy rather than protection of trial by jury.[862]

From an overview of state case law, constitutions, and statutes, the only clear generalization is that most have not focused on the issue. This is consistent with the federal appellate circuits prior to *Lind*.[863] It is not surprising that such a variation should exist between most states and most federal courts with respect to jury trial.[864] Like the federal system, however, Maryland has taken a highly protective view of trial by jury.[865] It is such a protective outlook that has engendered *Lind* and its progeny.

V. GUIDELINES FOR A SYNTHESIS OF NEW TRIAL AND THE RIGHT TO TRIAL BY JURY IN MARYLAND

Unlike most of the federal circuits, Maryland appellate courts have never reversed a trial court's grant of a motion for a new trial on the basis that such grant deprived the litigants of a jury trial. Indeed, Maryland appellate courts have never reversed a trial court for granting a new trial. Maryland trial courts have not shown a strong willingness to set aside verdicts; Maryland trial courts have

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("Not more than two (2) new trials shall be granted to the same party in an action at law, or upon the trial by jury of an issue of fact in equity."); VA. CODE ANN. § 8.01-383 (Michie 1992)("Not more than two new trials shall be granted to the same party in the same case on the ground that the verdict is contrary to the evidence, either by the trial court or the appellate court, or both."); W. VA. CODE § 56-6-28 (1997) (Not more than two new trials shall be granted to the same party on the ground that the verdict is contrary to the evidence, either by the trial court, or the appellate court, or both.").

862. This is true of Alabama's and West Virginia's statutes. *See* Liberty Nat'l Life Ins. Co. v. Trammell, 67 So. 2d 41, 45 (Ala. 1953) ("To be sure justice never tires, but the adoption of the statute indicates that there must be an end to litigation, and this though is may appear that a wrong has been imposed."); Watterson v. Moore, 23 W. Va. 404, 405 (1884) ("It was the evident purpose and policy of the statute that there should be an end to litigation."). The Supreme Court of the United States has recognized that the Tennessee limitation on the granting of new trials was intended to preserve the right to trial by jury. *See* Louisville and Nashville R.R. Co. v. Woodson, 134 U.S. 614 (1890).

863. For a discussion of *Lind* and its progeny, see *supra* notes 706-822 and accompanying text.

864. Not all states have been as protective of the right to trial by jury in the context of mixed legal and equitable claims as the federal courts in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). *See* Richard W. Bourne & John A. Lynch, Jr., *Merger of Law and Equity Under the Revised Maryland Rules: Does it Threaten Trial by Jury?* 14 U. BALT. L. REV. 1, 46, n.295 (1984).

865. *See* Higgins v. Barnes, 310 Md. 532, 542, 530 A.2d 724, 728-29 (1987) (discussing Maryland's history guaranteeing the right to jury trial).

shown just the opposite tendency.[866] Maryland trial courts have generally permitted even anomalous verdicts to stand.[867] Very few appellate cases involve appeals of the granting of a new trial; most involve appeals of the denial of a motion for a new trial.[868] The court of appeals has suggested only in the most general way that trial by jury limits a trial judge's discretion with respect to disposition of a new trial motion.[869]

It is clear that this broad discretion is an historical complement of the right to trial by jury.[870] Restricting this discretion would, to some extent, amount to an enlargement of the scope of jury trial. Like the federal judicial system, Maryland has evolved to new conceptions of the scope of the right to trial by jury in contexts other than disposition of a new trial.[871]

In the federal system, restriction of the discretion of a trial judge to grant a new trial to reflect the jury trial right has involved greater appellate scrutiny.[872] Thus far, the Maryland appellate courts have not strictly scrutinized the disposition of motions for new trial on the basis that the verdict is excessive or inadequate or against the weight of the evidence[873] other than to insist that such discre-

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866. *See supra* Part II.

867. *See, e.g.*, Brinand v. Denzik, 226 Md. 287, 173 A.2d 203 (1961) (allowing a verdict to stand despite improper remarks regarding tabulating damages); Thodos v. Bland, 75 Md. App. 700, 542 A.2d 1307 (1988) (upholding the trial court's denial of a motion for new trial even though the trier of fact found negligence of either one or the other driver involved in the accident was the proximate cause, but returned verdicts for the defendants).

868. *See generally* Kirkpatrick v. Zimmerman, 257 Md. 215, 262 A.2d 531 (1970); Grabner v. Battle, 256 Md. 514, 260 A.2d 634 (1970); Perlin Packing Co. v. Price, 247 Md. 475, 231 A.2d 702 (1967); State v. Gray, 227 Md. 318, 176 A.2d 867 (1962); Leizear v. Butler, 226 Md. 171, 172 A.2d 518 (1961); Hill v. Coleman, 218 Md. 1, 144 A.2d 694 (1958); Rephann v. Armstrong, 217 Md. 90, 141 A.2d 525 (1958); Riley v. Naylor, 179 Md. 1, 16 A.2d 857 (1940); Von Schlegell, Inc. v. Ford, 167 Md. 584, 175 A. 589 (1934); Chiswell v. Nichols, 139 Md. 442, 115 A. 790 (1921).

869. *See In re* Petition for Writ of Prohibition, 312 Md. 280, 539 A.2d 664 (1988); Snyder v. Cearfoss, 186 Md. 360, 46 A.2d 607 (1946) (suggesting that great weight be given to jury verdicts and that they not be overturned simply because the judge would have found differently).

870. *See* Baltimore & Ohio R.R. Co., 65 Md. 198, 9 A. 126 (1886) (noting that courts and juries have separate spheres of responsibility and that it is not within the power of one to encroach upon or restrict the power of the other).

871. *See supra* Part III.

872. *See supra* notes 392-543 and accompanying text.

873. *See* Leizear v. Butler, 226 Md. 171, 178, 172 A.2d 518, 521 (1961).

tion be exercised in a knowledgeable way.[874]

Lind and its progeny accord great weight to the trial court's discretion, but they insist on more. Those cases following *Lind* have applied greater appellate scrutiny in cases involving the grant of a new trial than in those involving the denial of a new trial. This is consistent with a protective view of trial by jury because the denial of the new trial motion upholds the jury's verdict.

Some federal and state cases have required that the trial court articulate specifically its reasons for granting a new trial.[875] Maryland does not appear to have imposed such a requirement in this context. If greater appellate scrutiny were to be applied to some dispositions of new trial motions, specific findings would facilitate such review. The requirements imposed in federal and other state courts in this regard are not unlike that imposed on trial courts sitting without a jury under the Maryland rules.[876]

The greatest difference among state and federal courts that have imposed more stringent appellate review over grant of a new trial has been in the degree to which a trial court must find a verdict is excessive or inadequate or against the weight of the evidence before he or she is permitted to set it aside. The District of Columbia Circuit, for example, prohibits setting a verdict aside for excessiveness unless "it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."[877] Other circuits allow the grant of a new trial to prevent a "miscarriage of justice."[878] Yet another standard permits

874. *See* Grabner v. Battle, 256 Md. 514, 519, 260 A.2d 634, 636 (1970). In *Washington, Baltimore & Annapolis Elec. R.R., v. Kimmey*, 141 Md. 243, 118 A. 648 (1922), this meant that the trial court should have considered evidence that raised "serious suspicion as to [the] validity and merit" of the judgment challenged on the new trial motion. *Id.* at 253, 118 A. at 652; *see also* Angell v. Just, 22 Md. App. 43, 321 A.2d 830 (1974).

875. *See, e.g.*, King v. Davis, 980 F.2d 1236, 1237 (8th Cir. 1992); *see also* Hawk v. Seaboard System R.R., Inc., 547 So. 2d 669, 671 (Fla. Dist. Ct. App. 1989); Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 n.9 (Utah 1991).

876. *See* MD. R. CIV. P. 2-522(a) (requiring court judges to enter into the record a statement of the reasons for the decision or basis of determining damages); Pearson v. Wiltrout, 17 Md. App. 497, 498 n.1, 302 A.2d 678, 679 n.1 (1973).

877. Taylor v. Washington Terminal Co., 409 F.2d 145, 149 (D.C. Cir. 1969) (quoting Graling v. Reilly, 214 F. Supp. 234, 235 (D.D.C. 1963)). For a discussion of *Taylor*, see *supra* notes 755-84 and accompanying text.

878. *See, e.g.*, Delli Santi v. CNA Ins. Cos., 88 F.3d 192 (3d Cir. 1996) (quoting Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992)); McGee v. South Permiscot Sch. Dist. R-V, 712 F.2d 339 (8th Cir. 1983) (quoting Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 187 (8th Cir.

grant of a new trial when "'it is quite clear that the jury has reached a seriously erroneous result.'"[879] In light of the traditional latitude given trial courts in Maryland with respect to the disposition of a motion for a new trial,[880] as well as the deference of trial judges to jury verdicts,[881] none of these standards would fit very comfortably into established Maryland jurisprudence.

A fourth standard, however, allows more deference to a trial court in granting a motion for a new trial. This standard allows the granting of a new trial if the verdict is against the great weight of the evidence.[882] Such a standard allows the jury significant latitude in fulfilling its fact-finding role, yet does not unduly restrict the trial court in deciding whether the jury has strayed too far from what the evidence will support.

VI. CONCLUSION

Until recently, most American jurisdictions viewed grant of a new trial as posing no threat to the right to trial by jury.[883] This is because the grant of this motion was followed by another jury trial. Trial courts had enormous discretion in setting aside a jury's work and making the judicial wheels spin yet again in the same cause. There is no indication that trial courts in Maryland have capriciously used this power to obtain results consistent with their own predilections at the expense of the jury's proper role.[884]

In the last generation, particularly in the federal appellate courts, increasing authority has developed for the notion that allowing unfettered discretion to a trial court in setting aside a jury verdict is at odds with the right to trial by jury.[885] To some extent, such a notion entails re-examination of the right to trial by jury. Notwithstanding that the boundaries of the jury trial right in the

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1972)).

879. Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 6 (1st Cir. 1982) (quoting Borras v. Sea-Land Serv., Inc., 586 F.2d 881, 887 (1st Cir. 1978)). For a discussion of *Coffran*, see *supra* notes 800-14 and accompanying text.

880. *See, e.g.*, Brinand v. Denzik, 226 Md. 287, 173 A.2d 203 (1961); Leizear v. Bulter, 226 Md. 171, 172 A.2d 203 (1961).

881. *See supra* notes 56-58 and accompanying text.

882. *See* Hardin v. Hayes, 52 F.3d 934, 938 (11th Cir. 1995).

883. *See supra* notes 702-865 and accompanying text.

884. One co-author is familiar with an instance in which a well-known trial judge in a court, (thankfully) not in Maryland, informed a plaintiff's lawyer that he would grant new trials successively if the lawyer's client obtained verdicts in an amount in excess of the defendant's settlement offer.

885. *See supra* notes 706-822 and accompanying text.

federal courts and Maryland are rooted in history,[886] both systems have evaluated such boundaries in light of contemporary procedural developments and exigencies.[887] There does not appear to be any constitutional impediment to imposing at least a modest check on the discretion of a trial judge in granting a new trial.[888] Requiring the trial judge to weigh the impact of granting this motion on the right to jury trial itself would be an effective way to resolve the inherent constitutional tension between jury trial and the motion for new trial.[889]

886. *See supra* notes 392-701 and accompanying text.
887. *See supra* notes 392-701 and accompanying text.
888. *See supra* notes 866-82 and accompanying text.
889. *See supra* notes 866-82 and accompanying text.