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THE POWER OF A FEDERAL APPELLATE COURT TO DIRECT ENTRY OF JUDGMENT AS A MATTER OF LAW: REFLECTIONS ON *WEISGRAM v. MARLEY CO.*

Robert A. Ragazzo*

The civil jury plays an important role in our democratic society. Commentators have often waxed eloquent on this fundamental feature of the Anglo-American judicial system. Blackstone described the right to a jury trial as “the glory of the English law” and “the most transcendent privilege which any subject can enjoy.”¹ Justice Story wrote: “The Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed [the right to a jury trial] in the most solemn terms.”²

In modern times, some have been more sanguine about the right to a jury trial in civil cases. The civil jury has been criticized on a number of grounds.³ The jury is often far from a representative cross-section of the community.⁴ The jury may not be particularly good at finding facts,⁵ especially in complex

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1. William Blackstone, *Commentaries on the Laws of England* vol. 3, *379 (Garland Publ. 1978).

2. Joseph Story, *Commentaries on the Constitution of the United States*, vol. II, § 1779, 558-59 (Little, Brown & Co. 1891).

3. For an article surveying the various criticisms of the civil jury and attempting an empirical refutation of these criticisms, see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 *Ariz. L. Rev.* 849 (1998).

4. See Warren E. Burger, *Thinking the Unthinkable*, 31 *Loy. L. Rev.* 205, 210-11 (1985) (suggesting that “[w]e must stop deluding ourselves” because “[t]he juries actually selected in most protracted cases are rarely true cross-sections”).

5. See Jerome Frank, *Law and the Modern Mind* 180-81 (Brentano’s 1930) (arguing that jurors “are hopelessly incompetent as fact finders” and that “no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do”).

cases.⁶ Finally, the jury may be swayed by sympathy and is often thought to display a pro-plaintiff bias.⁷

The twentieth century has seen the development of mechanisms that allow the bench to exercise control over the civil jury's function. The United States Supreme Court has upheld against Seventh Amendment attack the power of trial judges to remove cases from the jury's province and grant judgment as a matter of law where one party's proof is insufficient.⁸ In a trilogy of cases decided in 1986, the Supreme Court molded the summary judgment procedure into a gate-keeping mechanism that allows the trial judge to dismiss meritless cases prior to the commencement of trial.⁹

6. See Franklin Striber, *Reconstructing Justice: An Agenda for Trial Reform* 111-12 (Quorum Books 1994) (arguing that "jurors lack adequate memories for recalling trial testimony and have difficulties making decisions based on statistical or probabilistic information" and that "an especially perplexing task for lay jurors is to assimilate and select in some rational manner from the competing testimony of expert witnesses"); Burger, *supra* n. 4, at 211 (noting that in complex cases "[t]he analysis of documents, of expert testimony, of charts, graphs and other visual aids, and the comprehension of such evidence, present problems which often only a sophisticated business executive, an economist, or another expert could grasp").

7. See e.g. Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 Cornell Intl. L.J. 79, 111 (1996) (citing a study by the RAND corporation that "confirmed the pro-plaintiff attitude of juries when defendants were corporations and plaintiffs suffered severe injuries"). *But see* Anthony Z. Roisman, *Conflict Resolution in the Courts: The Role of Science*, 15 Cardozo L. Rev. 1945, 1954 (1994) (noting that "studies have found that juries are increasingly pro-business and anti-plaintiff, thanks in part to the propaganda from tort reform advocates").

8. See *Galloway v. U.S.*, 319 U.S. 372 (1943) (upholding the power to grant judgment as a matter of law before the jury returns a verdict); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935) (upholding the power to grant judgment as a matter of law after the jury returns a verdict). These cases are discussed in Part II.A.

9. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Anderson*, the Court held that "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding" that the plaintiff has proved his case by the relevant evidentiary standard. *Anderson*, 477 U.S. at 255-56. Thus, the party with the burden of proof can no longer defeat a summary judgment motion simply by introducing some evidence (the so-called scintilla rule), and the court may consider the entire record in determining what a reasonable jury could find. See also Fed. R. Civ. P. 50(a)(1) (2000) (codifying the reasonable juror standard). Two commentators have argued that the Supreme Court's "liberalized summary judgment [standard] inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class." Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 75 (1990).

The power of federal courts to address meritless cases subsequent to the commencement or completion of trial is authorized by Rule 50 of the Federal Rules of Civil Procedure, which provides for entry of judgment as a matter of law.¹⁰ In contrast to the Rule's explicit grant of this power to federal district courts, the United States Supreme Court has considered the scope of authority implicitly conferred by Rule 50 upon federal appellate courts in two significant decisions. In *Neely v. Martin K. Eby Construction Co.*,¹¹ the Court held that a federal appellate court possesses the power to direct entry of judgment as a matter of law for a verdict loser. More recently, in *Weisgram v. Marley Co.*,¹² the Court affirmed the power of federal appellate courts to reverse and render judgment as a matter of law on behalf of verdict losers where the verdict was dependent on improperly admitted expert testimony.

This article considers the significance of the *Weisgram* decision for federal appellate practice. Part I will review the *Neely* decision, but will primarily focus on the facts and holding of *Weisgram*. Part II will consider whether *Neely* and *Weisgram* are correct in holding that federal appellate courts possess the raw power to direct entry of judgment as a matter of law for verdict losers, concluding that they have such power. Part III will discuss the circumstances under which federal appellate courts should exercise the power to direct entry of judgment as a matter of law, concluding that *Weisgram* appears overly liberal in delineating such circumstances.

I. BACKGROUND: JUDGMENT AS A MATTER OF LAW

A. *Neely v. Martin K. Eby Construction Co.*

The Supreme Court first addressed the use of judgment as a matter of law by appellate courts as a means to rid the courts of unmeritorious cases in *Neely v. Martin K. Eby Construction*

10. Traditionally, this power was referred to as *judgment notwithstanding the verdict*. The rule now uses the term *judgment as a matter of law*. Fed. R. Civ. P. 50 (West Group 2000). The author uses the term judgment as a matter of law throughout this article.

11. 386 U.S. 317 (1967).

12. 528 U.S. 440 (2000).

*Co.*¹³ In that case, the Court held that a federal appellate court had the power to direct entry of judgment as a matter of law for a verdict loser where the evidence in the record was insufficient to support the jury's verdict as a matter of law.¹⁴ The plaintiff in *Neely* received a jury verdict in a negligence action. The defendant moved for judgment notwithstanding the verdict on the ground that the evidence was insufficient to establish negligence. The trial court denied the defendant's motion and entered judgment on the verdict. The court of appeals reversed, holding that the trial court should have granted the defendant's motion, and remanded with instructions to dismiss the complaint.¹⁵ The Supreme Court held that a federal appellate court possesses the power to direct entry of judgment as a matter of law for a verdict loser.¹⁶ The Court held that exercise of this power is consistent with: (a) the Seventh Amendment; (b) the scope of appellate review contained in 28 U.S.C. § 2106; and (c) Rule 50 of the Federal Rules of Civil Procedure.¹⁷

The *Neely* Court was mindful of the need to "protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial."¹⁸ The Court noted that the verdict winner, in addition to attempting to preserve his verdict and judgment, could make a conditional new trial motion in the court of appeals in the event his verdict was set aside.¹⁹ In some cases, where the appellate court believes the district court erroneously denied the verdict loser's motion for judgment as a matter of law, the appellate court should remand to permit the district court to consider the verdict winner's new trial motion due to the district court's superior familiarity with the case.²⁰ Because the verdict winner in *Neely* raised no grounds for a new trial in the court of appeals, the Supreme Court held that the court of appeals properly directed

13. 368 U.S. 317 (1967).

14. *Id.* at 321, 330.

15. *See id.* at 319-20.

16. *See id.* at 321, 330.

17. *See id.* at 322-30.

18. *Id.* at 325.

19. The Court noted that the verdict winner could urge his new trial grounds in his brief to the court of appeals or "in a petition for rehearing if the court of appeals has directed entry of judgment for appellant." *Id.* at 329.

20. *See id.* at 325.

entry of judgment as a matter of law for the verdict loser.²¹ Thus, although *Neely* court rejected the argument that there is a “total lack of power” in the court of appeals to direct entry of judgment as a matter of law,²² it did not hold that the court of appeals should always, or routinely, use this power.

B. *Weisgram v. Marley Co.*

In *Weisgram v. Marley Co.*,²³ the Supreme Court returned to this question. In *Weisgram*, the plaintiff brought a wrongful death action against the manufacturer of a baseboard heater. The plaintiff alleged that the heater was defective and malfunctioned, causing a fire that resulted in his mother’s death. The plaintiff’s proof on these issues was tendered to the jury through the testimony of three expert witnesses. The jury’s verdict was for the plaintiff, and the defendant moved for judgment as a matter of law before and after the jury’s verdict. The trial judge denied both motions and entered judgment on the verdict. The court of appeals held that the testimony of the plaintiff’s three experts should not have been admitted and, without this evidence, that the plaintiff could not establish a prima facie case. The court of appeals remanded with instructions to enter judgment as a matter of law for the manufacturer.²⁴ The Supreme Court held that the court of appeals properly directed entry of judgment as a matter of law where the expert testimony was inadmissible and therefore unavailable to support the jury’s verdict.²⁵ Without that evidence, the verdict could not stand.

1. *The Facts and Procedural History*

On December 30, 1993, Bonnie Weisgram died in her home as a result of carbon monoxide poisoning caused by a fire. Chad Weisgram, the decedent’s son, brought a wrongful death action on behalf of himself and his mother’s heirs against

21. The verdict winner attempted to raise new trial grounds for the first time in the Supreme Court, and the Court refused to consider these grounds. *See id.* at 330.

22. *Id.*

23. 528 U.S. 440 (2000).

24. *See id.* at 445.

25. *See id.* at 446, 457.

Marley Company, the manufacturer of a baseboard heater used in his mother's home.²⁶ The plaintiff's theory of the case was that the baseboard heater malfunctioned and caused a fire that spread to a nearby sofa and spawned the fumes resulting in his mother's death.²⁷ The defendant argued that Bonnie Weisgram inadvertently caused the fire by dropping a lighted cigarette behind the sofa.²⁸

The plaintiff called three expert witnesses to make his case that the baseboard heater malfunctioned and caused the fire. Initially, the plaintiff called Dan Freeman, a fire captain who had performed an investigation for the local fire department. Freeman opined that the burn and smoke patterns indicated that the fire started in the entrance to Weisgram's home and radiated to the sofa. He hypothesized a number of facts: The baseboard heater malfunctioned and emitted excess heat; a throw rug placed against the heater contained the heat and caused the heat to build up; the heat raised the temperature on the vinyl floor, which caused the release of gases; and these gases ignited and caused the fire that engulfed the sofa and released the fumes that killed Bonnie Weisgram.²⁹

Second, the plaintiff called Ralph Dolence, an electrician whose theory of the fire was the same as Freeman's. Although he could not identify any design or manufacturing defect in the heater, Dolence argued that the heater's thermostat and backup high-limit control (which was designed to shut off the heater at 190 degrees) malfunctioned, causing the heater to emit excess heat. In Dolence's view, this excess heat was trapped and increased by the proximity of the throw rug, causing the vinyl floor to heat up and release vapors that ignited and caused the fire.³⁰

Third, the plaintiff called Sandy Lazarowicz, a metallurgist. He testified that the heater's thermostat contacts were defectively designed, which caused them to weld shut and

26. *See Weisgram v. Marley Co.*, 169 F.3d 514 (8th Cir. 1999), *aff'd*, 528 U.S. 440 (2000). State Farm Fire and Casualty Company sued Marley to recover insurance benefits paid to cover damage caused by the fire. *See id.* at 516.

27. *See id.* at 517.

28. *See id.* at 518 n. 4.

29. *See id.* at 518-19.

30. *See id.* at 519-20.

rendered the thermostat cut-off mechanism ineffective. Lazarowicz also theorized that the backup high-limit control failed to shut off the heater because the mechanism was placed in a location that prevented it from sensing the actual temperature of the heater.³¹

The district court admitted the testimony of plaintiff's three experts over the defendant's objection. The jury found for the plaintiff and awarded \$500,000 to the plaintiff and Bonnie Weisgram's heirs.³² The court of appeals held by a 2-1 vote that the district court abused its discretion in admitting the testimony of plaintiff's experts under Rule 702 of the Federal Rules of Evidence³³ and the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁴

The Eighth Circuit's majority held that Freeman was qualified to testify as an expert in fire investigation that the burn and smoke patterns indicated a fire that began in the entranceway and spread to the sofa, but that the rest of Freeman's testimony was "blatant speculation."³⁵ The majority emphasized that there was no record evidence on the location of the throw rug prior to the start of the fire or the components or physical properties of the vinyl flooring. The majority also viewed Dolence's testimony as "rank speculation."³⁶ The majority noted that Dolence had not done any testing to validate his theory, relied principally on the observations made by Freeman, and could not identify a design or manufacturing defect in the heater. Similarly, the majority dismissed Lazarowicz's opinions as nothing more than "subjective belief or unsupported speculation."³⁷ The court noted that Lazarowicz had not tested to determine whether it was possible for the

31. *See id.* at 520-21.

32. *See id.* at 516. The jury also awarded \$100,575.42 to State Farm Fire and Casualty Company. *Id.*

33. *See id.* at 521-22.

34. 509 U.S. 579 (1993). The *Daubert* criteria for the admission of expert scientific testimony are discussed in Part III.B. The court of appeals in *Weisgram* assumed that the *Daubert* criteria are generally relevant to all expert testimony, 169 F.3d at 517 n. 3, an assumption later confirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

35. *Weisgram*, 169 F.3d at 518.

36. *Id.* at 520.

37. *Id.* at 521 (quoting *Daubert*, 509 U.S. at 590).

thermostat contacts to weld shut prior to the fire, and he was not qualified to express an opinion regarding the failure of the backup high-limit control.

In the majority's view, the plaintiff's case, stripped of this expert testimony, was insufficient to survive the defendant's motion for judgment as a matter of law. The majority stated,

We reject any contention that we are required to remand for a new trial because our failure to do so would deny the plaintiffs the opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability. Although [Federal Rule of Civil Procedure 50(d)] certainly gives this Court the discretion to remand for a new trial, we can discern no reason to give the plaintiffs a second chance to make out a case of strict liability. . . . This is not a close case. The plaintiffs had a fair opportunity to prove their claim and they failed to do so.³⁸

As a consequence, the court of appeals vacated the judgment of the district court and remanded with instructions to enter judgment as a matter of law for the defendant, Marley Company.³⁹

2. *The Supreme Court Opinion*

The Supreme Court granted certiorari to resolve a conflict among the courts of appeals regarding whether Rule 50 "permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case."⁴⁰ A unanimous

38. *Weisgram*, 169 F.3d at 517 n. 2.

39. *See id.* at 522.

40. *Weisgram v. Marley Co.*, 528 U.S. 440, 441 (2000). The Eighth Circuit in *Weisgram* followed its previous decision in *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) and agreed with two other circuits in holding that a federal appellate court may direct entry of judgment as a matter of law after subtracting erroneously admitted evidence. *See Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1178-79 (4th Cir. 1997); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 301, 306 (6th Cir. 1997), *cert. denied*, 522 U.S. 817 (1997); *see also Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 115-16 (3d Cir. 1987) (dictum), *cert. denied*, 484 U.S. 853 (1987). The Tenth Circuit, by contrast, had held that an appellate court should not direct entry of judgment as a matter of law in such circumstances because the verdict winner may have relied on the trial court's evidentiary rulings. *See Kinser v. Gehl Co.*, 184 F.3d 1259, 1267, 1269 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 985 (2000). A number of other appellate courts had held

Court answered the question in the affirmative. The Court relied on its prior decision in *Neely v. Martin K. Eby Construction Co.*⁴¹ to establish that the court of appeals possessed the power to direct entry of judgment as a matter of law.⁴² The Court rejected any policy distinction between

cases in which judgment as a matter of law is requested based on plaintiff's failure to produce enough evidence to warrant a jury verdict, as in *Neely*, and cases in which the proof introduced becomes insufficient because the court of appeals determines that certain evidence should not have been admitted, as in the instant case.⁴³

There are two strands to the Court's reasoning. On one hand, the Court rejected the plaintiff's contention that it was unfair to allow an appellate court to direct entry of judgment as a matter of law because, had the plaintiff known that its expert witnesses could not testify, he would have had the opportunity to present other experts or other proof in the district court. The Court suggested that any reliance placed by the plaintiff on the district court's admissibility rulings was inappropriate:

Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. . . . [A]lthough *Weisgram* was on

that it was improper for the trial judge to grant judgment as a matter of law after deciding to exclude evidence presented to the jury. See *Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998); *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-96 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1188-89 (4th Cir. 1990); *Sumitomo Bank of Cal. v. Prod. Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Townsend v. U.S. Rubber Co.*, 392 P.2d 404, 406 (N.M. 1964). But see *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1198-99 (3d Cir. 1993). Indeed, the Eighth Circuit had previously concurred with this limitation on the district court's power. See *Midcontinent Broad. Co. v. N.C. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973). Because an appellate court's entry of judgment as a matter of law raises more serious concerns than a trial court's, as discussed in Part III.B, the courts expressing the view that a trial judge is required to take the record as presented to the jury in ruling on a motion for judgment as a matter of law may be viewed as agreeing with the Tenth Circuit's opinion in *Kinser*.

41. 386 U.S. 317 (1967).

42. See *Weisgram*, 528 U.S. at 450.

43. *Id.* at 452.

notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence.⁴⁴

Following this strand of reasoning, an appellate court that views one party's proof as factually insufficient after deleting improperly admitted evidence has no reason to hesitate in directing entry of judgment as a matter of law after deleting inadmissible evidence. There is a presumption that every party presents its best case to the district court and, had the verdict winner known that certain of his evidence would be inadmissible, that he would have had no other evidence to present.

On the other hand, the Court reiterated that a verdict winner faced with a motion for judgment as a matter of law could, in addition to opposing the motion, make a conditional motion for a new trial.⁴⁵ The Court reaffirmed its position in *Neely* that "there are myriad situations in which the determination whether a new trial is in order is best made by the trial judge."⁴⁶ The Court did not, however, view the instant case to be in this category. It noted that "Weisgram offered no specific grounds for a new trial to the Eighth Circuit"⁴⁷ and that, in the view of the court of appeals, this was "not a close case."⁴⁸ Thus, as in *Neely*, the Court's narrow holding was only that the court of appeals has the power to direct entry of judgment as a matter of law after excluding improperly admitted evidence. Its suggestion that this power can be liberally exercised is nevertheless troubling.

Weisgram involves a significant extension of *Neely* because the plaintiff's proof was concededly sufficient based on the record evidence. The problem was not that the jury reached an unreasonable conclusion based on the record; rather, the problem was that the record was tainted by the trial judge's improper admission of certain evidence. The verdict winner in

44. *Id.* at 455 (internal citations omitted).

45. The Court noted, as it had in *Neely*, that a verdict winner could present his new trial grounds in his brief to the court of appeals or a petition for rehearing. *See Weisgram*, 528 U.S. at 455 n. 11; *see also supra* n. 19 and accompanying text.

46. *Weisgram*, 528 U.S. at 456.

47. *Id.*

48. *Id.*

Weisgram may well have relied on the trial judge's admissibility rulings in deciding what other evidence to present. Had the verdict winner known that the testimony of his three proffered experts would not be admissible, he might have tendered other experts or searched for other proof that the baseboard heater was defective and caused the fire. Although *Weisgram*, like *Neely*, permits the court of appeals to remand to the trial court the question whether the verdict winner should be granted a new trial,⁴⁹ it raises troubling questions regarding the appellate court's power finally to resolve a case by directing entry of judgment as a matter of law.

II. THE POWER OF A FEDERAL APPELLATE COURT TO DIRECT ENTRY OF JUDGMENT AS A MATTER OF LAW

The Supreme Court in *Neely* and *Weisgram* held that a federal appellate court's power to direct entry of judgment as a matter of law is consistent with three legal provisions: (a) the Seventh Amendment to the United States Constitution; (b) 28 U.S.C. § 2106; and (c) Rule 50 of the Federal Rules of Civil Procedure. This Part examines each justification in turn.

A. *The Seventh Amendment*

The Seventh Amendment states: "In Suits at common law, . . . 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."⁵⁰ Because the Seventh Amendment preserves rather than creates the common law right to a jury trial, the Supreme Court has long held that the amendment mandates an historical inquiry. Despite the fact that the United States had been an independent country for fifteen years in 1791 (the date of the Seventh Amendment's adoption), the Court has also long held that the historical reference is to the jury trial practice of the English common law courts in 1791 rather than the courts of the

49. *See id.* at 451, 457.

50. U.S. Const. amend. VII.

several states.⁵¹ However, the Supreme Court has vacillated on just how much history the Seventh Amendment imports.

In *Slocum v. New York Life Insurance Co.*,⁵² the Supreme Court considered the constitutional power of trial and appellate courts to enter judgment as a matter of law. In that case, the defendant moved for judgment as a matter of law at the close of the evidence on the ground that the evidence was insufficient to support a verdict. The trial court denied the motion, and the jury returned a plaintiff's verdict. The defendant moved for judgment as a matter of law after the jury's verdict. The trial court again denied the motion and entered judgment on the verdict. The appellate court found the evidence insufficient and reversed with instructions to enter judgment for the defendant.⁵³ The Supreme Court, in a 5-4 decision, held that the Seventh Amendment's reexamination clause precluded the entry of judgment for the defendant after the jury returned a verdict.⁵⁴

The majority took a strict historical view of the Seventh Amendment. The majority argued that, once the jury returned a verdict, the most an English court in 1791 could do if it believed the evidence insufficient was order a new trial.⁵⁵ The only way an English court could have removed a case from the jury and entered judgment based on insufficient evidence was by a demurrer to the evidence, which involved a very different procedure from the modern motion for judgment as a matter of law.⁵⁶ The demurrer to the evidence was made prior to the jury's

51. See e.g. *Dimick v. Shiedt*, 293 U.S. 474, 476 (1935); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); see also *U.S. v. Wonson*, 28 F. Cas. 745, 750 (Mass. Cir. 1812) (Story, J.) (noting that "[b]eyond all question, the common law here alluded to is not the common law of any individual state, . . . but it is the common law of England, the grand reservoir of all our jurisprudence"). Interestingly, since 1933 there has been no general right to a jury trial in English civil cases. See Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43, 106 n. 286 (1980).

52. 228 U.S. 364 (1913).

53. See *id.* at 369.

54. See *id.* at 399.

55. See *id.* at 380 (arguing that a verdict unsupported by the evidence "could be corrected on writ of error only by ordering a new trial").

56. There were two procedures that permitted an English court to enter judgment for a verdict loser. First, a defendant could move for judgment non obstante veredicto (i.e., notwithstanding the verdict) on the ground that the plaintiff's pleading allegations failed to state a claim. Second, the plaintiff could move to arrest judgment on the verdict where the defendant confessed the truth of the complaint's allegations and set up a matter in

verdict, not after. It required the movant to accept all the opposing party's evidence. If the demurrer was sustained, the trial court entered judgment for the movant. If the demurrer was overruled, the trial court entered judgment for the party opposing the movant. The trial court's determination could be reviewed on appeal, and the English appellate court had the opportunity to enter judgment for either party. Because the demurrer created a dispositive question of law for the court, the jury was discharged once the demurrer was made.⁵⁷ Thus, by its very nature, the demurrer to the evidence precluded entry of judgment by any court after the jury returned a verdict.

The four dissenters in *Slocum* believed that the majority had engaged in unnecessary formalism. The dissenters argued that, as long as there was some method by which an English court in 1791 could take the case away from the jury and enter judgment as a matter of law based on insufficient evidence, the precise particulars of the English procedure were irrelevant.⁵⁸ Having the jury return a verdict simply adds to the court's convenience. Because the modern motion for judgment as a matter of law does not require the movant to accept the other party's evidence, if a trial judge grants judgment as a matter of law prior to a jury verdict and the appellate court reverses, the case must be remanded for a new trial. However, if the jury returns a verdict and then judgment as a matter of law is granted to the verdict loser and the appellate court reverses, judgment based on the verdict can simply be reinstated.⁵⁹

avoidance that was legally insufficient to constitute a defense. As the *Slocum* Court noted, each of these procedures is addressed to the legal sufficiency of the pleadings rather than to the sufficiency of the proof upon which the jury's verdict is based. *See id.* at 381.

57. *See id.* at 388-92. At common law, the plaintiff had the right to take a nonsuit and have his complaint dismissed without prejudice where his proof was insufficient. However, as the *Slocum* Court noted, this procedure bears little resemblance to the modern motion for judgment as a matter of law because the nonsuit was voluntary in nature, did not result in the entry of judgment for the defendant, and did not bar the plaintiff from bringing another case based on the same claim. *See id.* at 392-94.

58. *See id.* at 408 (arguing that "[t]he Seventh Amendment, it cannot be doubted, deals with matters of substance and not with mere matters of form"); *see id.* at 423 (concluding that "the point is not that the ordinary practice on a motion for the direction of a verdict is identical with that on a demurrer to the evidence, but that the latter as well as the former was clearly permitted by the Constitution") (Hughes, J., dissenting).

59. *See id.* at 419 (suggesting that a court should be "authorized to take provisionally the verdict of the jury to avoid the delay and expense of a new trial in case it should appear

In *Baltimore & Carolina Line, Inc. v. Redman*,⁶⁰ the Supreme Court overruled *Slocum* in everything but name and adopted the position urged by the *Slocum* dissenters. In *Redman*, the defendant moved for judgment as a matter of law prior to the verdict. The trial court reserved its ruling and submitted the case to the jury. After the jury returned a plaintiff's verdict, the trial judge denied the motion for judgment as a matter of law and entered judgment on the verdict. The court of appeals held that the evidence was insufficient to support the verdict and reversed with instructions to grant a new trial on authority of *Slocum*.⁶¹

A unanimous Supreme Court held that the court of appeals should have directed entry of judgment for the defendant.⁶² The Court distinguished *Slocum* on the ground that the trial court reserved decision on the motion for judgment as a matter of law prior to the jury's verdict.⁶³ In *Slocum*, this first motion had simply been denied by the trial court. The Court referenced an English practice whereby a trial judge could take a jury's verdict subject to reserved questions of law and, based on the determination of the reserved questions, enter judgment for the verdict loser.⁶⁴ The Court seemed unconcerned that its historical analogue involved questions of law other than demurrers to the evidence. As already noted, the demurrer to the evidence resulted in the discharge of the jury.⁶⁵

on a careful consideration of the evidence that it involved a dispute of fact which the jury should have resolved").

60. 295 U.S. 654 (1935).

61. *See id.* at 656.

62. *See id.* at 661.

63. Fed. R. Civ. P. 50(b) codifies this result by providing:

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

Fed. R. Civ. P. 50(b) (West Group 2000). Thus, even if the court denies a motion for judgment as a matter of law made at the close of the evidence, the motion is deemed to be reserved. Rule 50(b) solves any lingering Seventh Amendment problems flowing from *Slocum* unless a party neglects to make a motion for judgment as a matter of law prior to the jury retiring.

64. *See Redman*, 295 U.S. at 659.

65. *See supra* text accompanying n. 57. The approach of *Redman* was applied in *Galloway v. U.S.*, 319 U.S. 372 (1943). In *Galloway*, the Supreme Court upheld against Seventh Amendment attack a trial court's entry of judgment as a matter of law prior to any jury determination. The Court relied primarily on the historical analogue of a demurrer to

It was an appellate court in *Redman* rather than the trial court that directed entry of judgment as a matter of law. Thus, the *Neely* Court, relying on *Redman*, saw “no greater restriction on the province of the jury when an appellate court enters judgment [as a matter of law] than when a trial court does” and held that the Seventh Amendment constitutes no bar to appellate direction of entry of judgment as a matter of law.⁶⁶ *Weisgram* simply relied on *Neely* for the same proposition.⁶⁷

The Supreme Court’s decision in *Gasperini v. Center for Humanities, Inc.*⁶⁸—which intervened between *Neely* and *Weisgram* and was not cited in *Weisgram*—casts some doubt on the view that it is irrelevant for Seventh Amendment purposes which level of court enters judgment as a matter of law. *Gasperini* involved a diversity case decided under New York substantive law. The case focused on a New York tort reform measure that permits a trial judge, or the New York Appellate Division, to review the size of a jury’s verdict and order a new trial whenever the verdict deviates materially from the evidence.⁶⁹ *Gasperini* held that a federal district court in examining the jury verdict for excessiveness must apply the New York “deviates materially” standard⁷⁰ rather than a federal standard that makes it more difficult to displace the jury’s

the evidence. The Court rejected the three dissenters’ argument that there were two significant procedural differences between modern and common law practice. *See id.* at 402-05 (Black, J., dissenting). First, at common law, a demurrer to the evidence could be sustained only if the party opposing the motion presented absolutely no evidence in support of some aspect of his case (the so-called “scintilla rule”). In *Galloway*, judgment as a matter of law was granted because the verdict was not supported by “substantial” evidence. *See id.* at 395. Currently, the motion is granted if the jury’s verdict is unreasonable in light of all the evidence. *See supra* n. 8 (discussing the granting of judgment as a matter of law before the jury returns a verdict). Second, a party making a demurrer to the evidence took a greater risk than a party making a motion for judgment as a matter of law because the demurrer required the movant to admit the opposing party’s evidence and risk entry of judgment for the opposing party. If a modern motion for judgment as a matter of law is denied, the case proceeds to the jury. Thus, *Redman* and *Galloway* make it easier for the judge to displace the jury than the common law procedure. As a consequence, whether this is viewed a positive or negative development, there has clearly been some diminution of the Seventh Amendment’s guarantee of a jury trial.

66. *Neely*, 386 U.S. at 322.

67. *See Weisgram*, 528 U.S. at 449.

68. 518 U.S. 415 (1996).

69. *See id.* at 422-25.

70. *See id.* at 426-31.

verdict, the so-called “shock the conscience” standard.⁷¹ The Court saw no Seventh Amendment problems with this result because English trial judges in 1791 could grant new trials based on the excessiveness of verdicts.⁷²

The Court had more difficulty with the New York provision that allows an appellate court to reverse a trial judge’s denial of a new trial motion if the appellate court finds that the amount of the verdict deviates materially from the evidence.⁷³ *Gasperini* held that federal rather than state law governs the standard of appellate review and that federal law permits review of a district judge’s denial of a new trial motion only for abuse of discretion.⁷⁴ The Court found this federal standard of review consistent with the Seventh Amendment.⁷⁵ The *Gasperini* Court viewed its Solomonic decision as balancing the interests of the New York tort-reform scheme and federal jury trial interests.⁷⁶ Thus, *Gasperini* suggests that a federal district court may have more power to displace a jury’s verdict than a federal appellate court.⁷⁷

Does *Gasperini* imply that the *Weisgram* Court erred in holding that a federal appellate court’s power to direct entry of judgment as a matter of law was coordinate with a district court’s? Although the *Weisgram* Court’s failure to discuss *Gasperini* is troubling, it would be wrong to take this view of *Gasperini*. *Gasperini* does more to confirm than deny the looser historical approach to the Seventh Amendment represented by *Redman* and, indirectly, by *Neely* and *Weisgram*. Although English trial courts had the power to grant new trials based on the excessiveness of verdicts, English appellate courts had no such power. They could only review trial court judgments for

71. The New York standard was enacted to give the courts greater control over jury awards. *See id.* at 422-24.

72. *See id.* at 433.

73. *Id.* at 434 (noting that “appellate review of a federal trial court’s denial of a motion to set aside a jury’s verdict as excessive is a relatively late, and less secure, development”).

74. *See id.* at 437-38.

75. *See id.* at 434-36.

76. *See id.* at 436-38.

77. Indeed, one Justice dissented to “reject the suggestion that the Seventh Amendment limits the power of a federal appellate court sitting in diversity to decide whether a jury’s award of damages exceeds a limit established by state law.” *Id.* at 439 (Stevens, J., dissenting).

errors of law and could not inquire into the factual sufficiency of verdicts. Three dissenters in *Gasperini* argued, therefore, that the Seventh Amendment precludes any appellate review of a district judge's denial of a new trial motion.⁷⁸ The majority did not take issue with the accuracy of the dissenters' historical rendition. Rather, it argued that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice."⁷⁹ Thus, the majority justified appellate review on policy rather than historical grounds. If the looser historical approach to the Seventh Amendment is correct, it would not seem to matter which level of court displaces a jury's verdict as long as some English judge had an analogous power in 1791.

Moreover, although the *Gasperini* majority did not permit appellate courts the same latitude as district courts in reviewing jury verdicts for excessiveness, *Gasperini* did not squarely hold that the Seventh Amendment requires this result. It held only that abuse of discretion review is consistent with the Seventh Amendment. In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,⁸⁰ upon which the *Gasperini* Court relied,⁸¹ the Supreme Court held that federal law (which relegated a particular fact question to the jury) prevailed over state law (which relegated the question to the judge) in a diversity case based on the strong federal policy in favor of jury trials flowing from the Seventh Amendment. *Byrd* reached this result without considering whether the Seventh Amendment mandated a jury trial on the instant facts.⁸² Similarly, *Gasperini*'s choice of the federal abuse of discretion standard in a diversity case does not necessarily indicate that broader appellate review would violate the Seventh Amendment. *Gasperini* is best viewed as a *Byrd*-inspired decision that does not preclude an appellate court from exercising the same power to review a jury's findings for sufficiency of the evidence as a trial court.⁸³

78. See *id.* at 450-54 (Scalia, J., dissenting).

79. *Gasperini*, 518 U.S. at 435.

80. 356 U.S. 525 (1958).

81. *Gasperini*, 518 U.S. at 431-33, 436-38.

82. See *Byrd*, 356 U.S. at 537 n. 10.

83. Moreover, *Weisgram* presents a stronger case than *Gasperini* for permitting appellate courts to exercise the same power as trial courts in reviewing jury verdicts

B. 28 U.S.C. § 2106

In granting appellate jurisdiction to the federal appellate courts, Congress has provided:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.⁸⁴

Because the statute permits any federal appellate court to vacate any appealed judgment and “direct the entry of such appropriate judgment . . . as may be just under the circumstances,” *Neely* held⁸⁵ and *Weisgram* reaffirmed⁸⁶ that a federal appellate court has the power to direct entry of judgment for a verdict loser.

To some extent this holding is circular. It depends on the other conclusions argued in Part II of this article: An appellate court’s direction to enter judgment is consistent with the Seventh Amendment and Rule 50 of the Federal Rules of Civil Procedure. If an appellate court’s direction of entry of judgment violated either provision it could not possibly be classified as “appropriate.” Moreover, it would seem that the considerations of Part III.A of this article are also relevant because, if policy were to dictate that fundamental unfairness would result from an appellate court’s direction to enter judgment, such direction would not be appropriate.⁸⁷ Thus, the construction of 28 U.S.C. § 2106 by *Neely* and *Weisgram* suggests only that as long as no other legal provisions are violated, and sound policy is furthered, a federal appellate court has the power to direct entry

because, although English appellate courts had no power to reverse the denial of new trial motions, they possessed de novo review with respect to decisions granting or denying demurrers to the evidence. *See supra* text accompanying n. 57.

84. 28 U.S.C. § 2106 (1994).

85. *Neely*, 386 U.S. at 322.

86. *Weisgram*, 528 U.S. at 449.

87. *See Neely*, 386 U.S. at 338-39 (Black, J., dissenting) (arguing that appellate direction of judgment is not appropriate under 28 U.S.C. § 2106 because Rule 50 and sound policy do not permit it).

of judgment as a matter of law. Although this conclusion is obviously correct, it proves very little.

C. Federal Rule of Civil Procedure 50

Rule 50 of the Federal Rules of Civil Procedure⁸⁸ governs motions for judgment as a matter of law and conditional new trial motions appended thereto. Although *Neely* and *Weisgram* are principally concerned with Rule 50(d), it is worth considering Rule 50 as an integrated whole.

Any party seeking judgment as a matter of law must so move prior to submission of the case to the jury.⁸⁹ If the trial court denies the motion, it is deemed to reserve decision and take the jury's verdict subject to the motion.⁹⁰ This procedure gives the verdict loser the opportunity to renew its motion for judgment as a matter of law after the jury returns a verdict.⁹¹ If the verdict loser fails to renew his motion for judgment as a matter of law, the most the trial or appellate court can do is order a new trial. A verdict loser may join its renewed motion for judgment as a matter of law with a conditional motion for a new trial.⁹² If the trial court grants judgment as a matter of law to the verdict loser, it is also required to rule on the conditional motion for a new trial.⁹³ If the appellate court reverses the grant of judgment as a matter of law, it then has the opportunity to review the trial court's decision on the conditional new trial motion.

Rule 50(c)(2) and Rule 50(d) deal with the verdict winner's new trial rights. If the trial court grants the verdict loser's renewed motion for judgment as a matter of law, the verdict

88. Fed. R. Civ. P. 50 (West Group 2000).

89. See Fed. R. Civ. P. 50(a)(2). Consistent with the Seventh Amendment, the district court may grant the motion of judgment as a matter of law without submitting the case to the jury or reconsider the motion after the jury's verdict. However, the district court may not grant a motion for judgment as a matter of law that is made for the first time after the jury's verdict. See *supra* n. 63 & text accompanying nn. 48-63.

90. See Fed. R. Civ. P. 50(b). This reservation permits the district court to grant judgment as a matter of law subsequent to the jury verdict without violating the Seventh Amendment. See *supra* text accompanying nn. 57-63.

91. See Fed. R. Civ. P. 50(b).

92. See *id.*

93. See *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); Fed. R. Civ. P. 50(c)(1).

winner has ten days to move for a new trial in the district court.⁹⁴ If the trial court denies the verdict loser's renewed motion for judgment as a matter of law and the verdict loser appeals, the verdict winner may urge as appellee any grounds entitling him to a new trial in the event the appellate court holds that the trial court erred in denying the verdict loser's renewed motion for judgment as a matter of law.⁹⁵ If the court of appeals holds that the trial court erred in denying the verdict loser's renewed motion for judgment as a matter of law, the court of appeals may resolve the new trial motion or remand to the district court for a determination of whether a new trial should be held.⁹⁶

Thus, Rule 50 contemplates that the verdict loser will make all challenges to the verdict in district court, including any motions for a new trial. It contemplates that the district court will make the initial determination of whether a new trial should be granted. The verdict winner, by contrast, is entitled to an opportunity to make a conditional new trial motion in the district court but is not always required to make such a motion. Rule 50 contemplates that the verdict winner may make his conditional new trial motion for the first time in the court of appeals.

It is worth examining each half of the verdict winner's situation relative to any conditional new trial motion. First, the verdict winner is entitled to the opportunity to make a conditional new trial motion in the district court. It is for this reason that the Supreme Court held, in *Cone v. West Virginia Pulp & Paper Co.*,⁹⁷ that a verdict loser may not receive judgment as a matter of law unless he renews such motion after the jury returns a verdict.⁹⁸ This renewed motion gives the verdict winner the opportunity to present any new trial grounds to the district court. *Cone* squarely rejected the contention that a verdict winner's rights are adequately protected by the

94. See Fed. R. Civ. P. 50(c)(2).

95. See Fed. R. Civ. P. 50(d).

96. See *id.*

97. 330 U.S. 212 (1947).

98. The holding in *Cone* has continually been reaffirmed by the Supreme Court. See *Johnson v. N.Y., N.H. & Hartford R.R. Co.*, 344 U.S. 48 (1952); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *Fountain v. Filson*, 336 U.S. 681 (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948).

opportunity to make new trial arguments in the court of appeals.⁹⁹

Second, the verdict winner is not required to present potential grounds for a new trial until and unless some court determines that judgment should be entered for the verdict loser. The verdict winner may oppose the verdict loser's renewed motion for judgment as a matter of law and make a conditional new trial motion in the district court. However, the verdict winner may also wait until ten days after the district court grants the verdict loser's renewed motion for judgment as a matter of law before moving for a new trial.¹⁰⁰ If the trial court denies the verdict loser's renewed motion for judgment as a matter of law, the verdict winner has similar latitude in the court of appeals. The verdict winner may urge conditional new trial grounds in the court of appeals as part of the original argument of the case or may present such grounds to the court for the first time in a petition for rehearing in the event the court of appeals holds that the district court erroneously denied judgment as a matter of law to the verdict loser.¹⁰¹

One may well ask why the verdict winner is not treated the same as the verdict loser with respect to conditional new trial motions? Why is the verdict winner not required to urge any new trial grounds on the district court in the first instance so that the appellate court is presented with a complete record for review? The asymmetry in Rule 50 is explained by the awkwardness of urging new trial grounds at the same time one is trying to defend a verdict and judgment.¹⁰² Urging grounds for a new trial may seemingly undermine the verdict and judgment one is trying to defend. Moreover, new trial grounds may be taken less seriously by the district court when the court is in the

99. See *Cone*, 330 U.S. at 216 (arguing that “[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart”).

100. See *Neely*, 386 U.S. at 325 (noting that “[w]here a defendant moves for [judgment as a matter of law] in the trial court, the plaintiff may present, in connection with that motion or with a separate motion after [judgment as a matter of law] is granted, his grounds for a new trial”); see Fed. R. Civ. P. 50(c)(2).

101. See *Weisgram*, 528 U.S. at 455; *Neely*, 386 U.S. at 328-29.

102. See *Weisgram*, 528 U.S. at 455 n. 11 (recognizing that “it is awkward for an appellee, who is wholeheartedly urging the correctness of the verdict, to point out, in the alternative, grounds for a new trial”).

process of entering judgment for the party making the conditional new trial motion.

As a consequence, the verdict winner is privileged, but is not always required, to present a new trial motion to the district court in the first instance. However, the verdict winner must live with the consequences of this choice. If the verdict winner chooses to save his new trial motion for the court of appeals, he should not be surprised that the court of appeals, in appropriate cases, has the power to deny the motion without a remand to the district court. Although Rule 50(d) stipulates that the court of appeals may remand the case to the district court for an initial determination of the verdict winner's conditional new trial motion, the rule is phrased in permissive terms.¹⁰³ This language implies that the court of appeals is not required to remand and may deny the new trial motion on its own and direct entry of judgment as a matter of law for the verdict loser. Where the verdict winner seeks to guarantee that the district court will rule on his conditional new trial motion in the first instance, he should make the motion in district court.

D. Conclusion

There is no affirmative reason that precludes a federal appellate court from directing entry of judgment as a matter of law. The Seventh Amendment, 28 U.S.C. § 2106, and Rule 50 of the Federal Rules of Civil Procedure all permit such action. As Part III.A argues, there are sound policy justifications for allowing appellate courts in some cases finally to resolve cases without remanding for a trial court's consideration of a verdict winner's new trial motion. As a consequence, *Neely* and

103. Fed. R. Civ. P. 50(d) provides:

If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Id. The dissenter in *Neely* argued that Rule 50(d) permits the appellate court to grant the verdict winner's new trial motion or remand to the district court but does not permit the appellate court to deny such motion. *See Neely*, 386 U.S. at 341 (Black, J., dissenting). However, it seems wrong to assume that Rule 50(d) creates any power for the courts of appeals or denies any power not expressly given by the rule. The rule merely emphasizes that an appellate court may exercise power to grant the new trial motion or remand that presumably flows from a source other than the rule ("nothing in this rule precludes").

Weisgram are correct to hold that federal appellate courts have the raw power to direct entry of judgment as a matter of law. However, as Part III.B demonstrates, this result hardly means that appellate courts should generally or routinely deprive the trial court of the power to consider a verdict winner's new trial motion.

III. EXERCISING THE APPELLATE POWER TO DIRECT ENTRY OF JUDGMENT AS A MATTER OF LAW

In *Neely*, the Supreme Court held that a federal appellate court has the power to direct entry of judgment as a matter of law for a verdict loser on the ground that the case submitted to the jury by the verdict winner was factually insufficient. In *Weisgram*, the Court extended *Neely* and held that a federal appellate court may make a similar direction after subtracting evidence on behalf of the verdict winner that was improperly admitted at trial. This Part will examine appropriate and inappropriate uses by federal appellate courts of the power granted by *Neely* and *Weisgram*.

A. *Situations in Which a Federal Appellate Court Should Direct Entry of Judgment as a Matter of Law*

Federal appellate courts should possess the power to direct entry of judgment as a matter of law for verdict losers because, in some situations, exercise of this power conserves judicial resources. There are three such situations: (a) where the verdict winner's grounds for a new trial rest upon legal questions the resolution of which makes it clear that no new trial is warranted; (b) where the verdict winner's grounds for a new trial presented to the district court could not be sustained as an exercise of discretion; and (c) where the verdict winner presents no grounds for a new trial and no reason why he should be permitted to present such grounds to the district court in the first instance.

The *Neely* Court had the first of these situations squarely in mind:

[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be

terminated. . . . The erroneous exclusion of evidence which would have strengthened [the verdict winner's] case is an important possibility. Another is that the trial court itself caused the insufficiency in [the verdict winner's] case by erroneously placing too high a burden of proof on him at trial. But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them.¹⁰⁴

To take *Neely's* example, suppose that the court of appeals holds that the district court improperly denied the verdict loser's motion for judgment as a matter of law, and the verdict winner argues that the district court erred as a matter of law in excluding certain of his evidence (e.g., under the hearsay rule), or that the district court erroneously allocated the burden of proof on a particular issue. In such cases, a remand to the district court for a new trial determination is often unnecessary. The district court has already made whatever legal rulings the verdict winner is challenging, and the court of appeals is presented with a full record for review. If the court of appeals holds that the district court committed no legal error in excluding evidence or allocating the burden of proof, there is no reason the court of appeals should not finally resolve the litigation by directing entry of judgment as a matter of law for the verdict loser.

However, if the court of appeals holds that the district court erred in excluding evidence or allocating the burden of proof, the appropriate resolution is not so clear. It may still be appropriate for the court of appeals to direct entry of judgment as a matter of law for the verdict loser. Perhaps the verdict loser's case is so strong that no reasonable juror could find for the verdict winner even if the verdict winner presented his additional evidence and the burden of proof were correctly allocated. In other circumstances, it might constitute an abuse of discretion for the trial court to grant the verdict winner's new trial motion.¹⁰⁵ In these cases, a remand to the district court

104. *Neely*, 386 U.S. at 327.

105. The decision to grant or deny a new trial motion is committed to the sound discretion of the district court and reviewable on appeal only for abuse of discretion. See e.g. *Gasperini*, 518 U.S. at 422-23, 437-39.

serves no purpose and unnecessarily wastes judicial resources because there is only one decision that will withstand appellate review.¹⁰⁶

Lastly, the court of appeals should direct entry of judgment as a matter of law whenever the verdict winner presents no grounds for a new trial and no reason why he should be permitted to present such grounds to the district court in the first instance.¹⁰⁷ This situation occurred in *Neely* itself.¹⁰⁸ Under such circumstances, a remand is a meaningless formality.

B. Situations in Which a Federal Appellate Court Should Not Direct Entry of Judgment as a Matter of Law

There are, by contrast, three situations in which federal appellate courts should not exercise the *Neely/Weisgram* power to direct entry of judgment as a matter of law: (a) where it is unfair to require the verdict winner to present his new trial grounds to the court of appeals; (b) where the new trial grounds involve an exercise of the district court's discretion that would be entitled to respect on appeal; and (c) where the district court is in a superior position to determine whether a new trial should be granted. The *Weisgram* case may be used to illustrate each situation.

The plaintiff in *Weisgram* conducted the trial with the understanding that the testimony of its experts would be admissible. Had the district court ruled that the plaintiff's experts would not be allowed to testify, the plaintiff would have had the opportunity to submit other experts or otherwise address

106. As argued in Part III.B, the appellate court should not direct entry of judgment as a matter of law for the verdict loser if a district court's decision to grant the verdict winner a new trial would be affirmed on appeal.

107. Circumstances in which the verdict loser should be permitted to present new trial grounds to the district court in the first instance are discussed in Part III.B.

108. As the Court noted:

In the Court of Appeals the issue was the sufficiency of the evidence and that court set aside the verdict. Petitioner, as appellee, suggested no grounds for a new trial in the event her judgment was reversed, nor did she petition for rehearing in the Court of Appeals, even though that court had directed a dismissal of her case.

Neely, 386 U.S. at 329. Although the verdict winner attempted to assert grounds for a new trial for the first time in the Supreme Court, the Supreme Court declined to consider arguments not presented to the court of appeals. *See id.* at 330.

the gaps in his case. It is for this reason that some pre-*Weisgram* cases held that the trial court, much less the court of appeals, lacks the power to enter judgment as a matter of law for the verdict loser after deleting certain of the verdict winner's evidence:

Although the trial court found insufficient evidence to sustain the verdict, it did so only after excluding plaintiff's expert testimony which had been presented to the jury. This was error. In ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence. . . . If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence.¹⁰⁹

After the Eighth Circuit's decision in *Weisgram*, the gaps in the plaintiff's case were clear. The plaintiff needed: (a) an expert on baseboard heaters rather than electrical, fire, and metallurgical experts; (b) proof regarding the position of the throw rug that might have contributed to the transfer of the fire from the heater to the sofa; and/or (c) proof regarding the potential for the flooring materials to heat up and give off vapors that might ignite.¹¹⁰ Thus, the first time the plaintiff could have offered new evidence and moved for a new trial with awareness of the defects in his case would have been in a petition for rehearing in the court of appeals.¹¹¹ As *Weisgram* confirms, the plaintiff was entitled to present his new trial grounds in such a petition.¹¹²

However, it was unfair to force the plaintiff to present his new trial grounds to the court of appeals in a petition for a rehearing rather than to the district court. The plaintiff had only fourteen days to petition the court of appeals for rehearing.¹¹³ It

109. *Midcontinent Broad. Co. v. N.C. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973); see also *supra* n. 40 (collecting cases).

110. See *supra* text accompanying nn. 33-35.

111. See Martin B. Louis, *Post-Verdict Rulings on the Sufficiency of the Evidence: Neely v. Martin K. Eby Construction Co. Revisited*, 1975 Wis. L. Rev. 503, 519 n. 90 (observing that "it is often difficult to argue that a gap in one's proof can be filled before a court has held that the gap exists").

112. See *Weisgram*, 528 U.S. at 455 & n. 11.

113. See Fed. R. App. P. 40 (West Group 2000).

is unfair to expect the plaintiff to put together a new case in fourteen days.¹¹⁴ Had the case been remanded, the district court might have allowed the plaintiff a reasonable time to proffer new evidence.¹¹⁵ Moreover, petitions for rehearing are routinely denied by the courts of appeals.¹¹⁶ Forcing a verdict winner to move for a new trial at this stage makes it extraordinarily unlikely that many new trials will be granted.

The *Weisgram* Court argued that it is fair to allow the court of appeals to direct entry of judgment as a matter of law after excluding certain evidence relied on by the verdict winner because parties should generally be expected to put forward their best cases in district court. The Court also emphasized that the verdict winner was on notice that his experts were subject to *Daubert* challenge and should have been prepared for the possibility that his experts would be excluded.¹¹⁷

Neither of these arguments is persuasive. The verdict winner surely did not withhold evidence in district court. He presented three experts—not one. Until the court of appeals acted, he had no way of knowing that he needed a heater expert and other physical proof. Until that time, he had every right to believe that he presented evidence from which a reasonable jury

114. The *Weisgram* Court argued that the fourteen-day period allowed for rehearing petitions was longer than the ten-day period allowed for new trial motions in the district court by a verdict winner after the district court grants the verdict loser's motion for judgment as a matter of law. See *Weisgram*, 528 U.S. at 455 n. 11; Fed. R. Civ. P. 50(c)(2). However, where the district court believes that the plaintiff is entitled to more time to prepare his case, the district court always has the power to allow the plaintiff to take a voluntary dismissal without prejudice. See *Neely*, 386 U.S. at 328 (noting that "[a] plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment [as a matter of law] may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof"); Fed. R. Civ. P. 41(a)(2) (permitting the district court to determine the circumstances pursuant to which a plaintiff will be permitted voluntarily to dismiss his action without prejudice).

115. There are no time limits in the Federal Rules of Civil Procedure on the ability to petition the district court for a new trial after an appellate reversal. Cf. Fed. R. Civ. P. 50(c)(2) (allowing a verdict winner ten days after the district court grants the verdict loser judgment as a matter of law to petition for a new trial); Fed. R. Civ. P. 59(b) (allowing a judgment loser ten days to petition the district court for a new trial).

116. For example, the Fifth Circuit clerk's office reports that, for the year ending September 30, 2000, only fourteen petitions for panel rehearing were granted out of a total of 523 (i.e., 2.7%). Clerk's Office, United States Court of Appeals for the Fifth Circuit, *Statistical Snapshot*, <<http://www.ca5.uscourts.gov/clerk/APPENDIXIREV.htm>> (accessed May 23, 2001).

117. See *supra* n. 44 and accompanying text.

could conclude that a defect in the heater caused the fire that killed Bonnie Weisgram.

Moreover, the verdict winner could not have known that his experts would be excluded by a *Daubert* analysis. In *Daubert*, the Supreme Court set forth four factors that guide consideration of whether an expert's theory is sufficiently reliable to assist the trier of fact: (a) the extent to which the theory has been and can be tested;¹¹⁸ (b) the extent to which the theory has been subjected to publication and peer review;¹¹⁹ (c) the theory's known or potential rate of error and the existence and maintenance of standards that control the theory's operation;¹²⁰ and (d) the extent to which the theory is generally accepted by other experts in the same field.¹²¹

This four-factor test is hardly straightforward and easy to apply.¹²² Four judges passed on the *Daubert* question in *Weisgram*.¹²³ Two judges (the district judge and the dissenter in the court of appeals) found that the verdict winner's experts passed *Daubert* scrutiny.¹²⁴ Two judges (the court of appeals's majority) found the experts' testimony inadmissible under *Daubert*.¹²⁵ Thus, the *Daubert* result is hardly something the verdict winner could have forecast.

Nor is it fair to suggest that the verdict winner should have understood in advance the grounds on which his experts would be excluded or what other experts might be allowed to testify. Under these circumstances, the verdict winner should not have been expected to produce new experts, which may entail substantial expense, or other evidence within fourteen days after the court of appeals's decision.

118. See *Daubert*, 509 U.S. at 593.

119. See *id.* at 593-94.

120. See *id.* at 594.

121. See *id.*

122. On the difficulty of applying the *Daubert* test, see generally Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. Miami L. Rev. 317 (2000).

123. The Supreme Court declined to address this issue. See *Weisgram*, 528 U.S. at 447 n. 3.

124. See *id.* at 444; *Weisgram*, 169 F.3d at 522-25 (Bright, J., dissenting).

125. See *Weisgram*, 169 F.3d at 517-22.

Weisgram may be used to illustrate a second circumstance in which the court of appeals should remand to the district court rather than direct entry of judgment as a matter of law. Suppose that the verdict winner in *Weisgram* had identified other potential experts and asked the court of appeals for a new trial on this ground. Under *Daubert*, whether to allow such testimony lies within the discretion of the trial court and is reviewable on appeal only for abuse of discretion.¹²⁶ In this circumstance, the court of appeals should refuse to remand only if it finds that allowing the new experts to testify would constitute an abuse of the district court's discretion. In any other circumstance, the court of appeals has usurped the power of the district court.¹²⁷

Finally, suppose that the plaintiff and verdict winner in *Weisgram* tried to shore up his physical evidence in a petition for rehearing after the appellate court's decision. Suppose that the plaintiff had new evidence to present with respect to the position of the throw rug that may have assisted in linking excess heat created by the baseboard heater to the igniting of the sofa, or evidence of the capacity of the flooring materials to heat up and give off gases that could ignite. Would this evidence in conjunction with the portions of the plaintiff's expert testimony that the court of appeals permitted be sufficient to get the plaintiff a new trial?

This type of decision is best reserved to the trial court. In complicated factual situations such as *Weisgram*, the district court is better positioned to evaluate whether a reasonable jury could find for the plaintiff with the introduction of additional evidence.¹²⁸ As the *Neely* Court noted: the verdict winner "may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of

126. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997).

127. Similarly, the court of appeals should remand where the verdict winner tendered additional admissible evidence that was excluded as cumulative by the district court. Cf. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1200 (3d Cir. 1993) (recognizing that, in this circumstance, it would be unfair for a district court to grant judgment as a matter of law for a verdict loser without considering all evidence admitted on behalf of the verdict winner).

128. The reasonable juror standard determines whether a party is entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 255-56. Obviously, if no reasonable juror could find for the plaintiff even with the introduction of the verdict winner's new evidence, there is no reason to do anything other than enter judgment as a matter of law for the verdict loser.

appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case."¹²⁹

It is true that the verdict winner in *Weisgram* never presented any grounds for a new trial and never suggested to the district court or the court of appeals any additional expert testimony or physical evidence that he might introduce.¹³⁰ Perhaps the verdict winner had no such evidence. Perhaps this is what the court of appeals meant when it noted that "this is not a close case."¹³¹ If the plaintiff had no other evidence, there is no difficulty in the court of appeals directing entry of judgment as a matter of law for the verdict loser. However, it seems that the verdict winner was entitled to a fair opportunity to develop additional evidence in the district court, and the district court was entitled, and in a better position to determine, whether any such additional evidence warranted a new trial.

IV. CONCLUSION

Neely and *Weisgram* hold that a federal appellate court possesses the raw power to direct entry of judgment as a matter of law pursuant to the Seventh Amendment, 28 U.S.C. § 2106, and Rule 50 of the Federal Rules of Civil Procedure. These holdings are correct and justified as a matter of policy because in many cases the Court's procedure conserves judicial resources. However, the *Weisgram* Court suggests that the appellate power to direct entry of judgment as a matter of law may be liberally exercised. *Weisgram* itself and some post-*Weisgram* cases have followed this suggestion.¹³²

This latter development should give us pause. A federal appellate court should direct entry of judgment as a matter of law for a verdict loser without giving the verdict winner an opportunity to present new trial grounds to the district court only where: (a) the verdict winner's grounds for a new trial rest upon

129. *Neely*, 386 U.S. at 325.

130. See *Weisgram*, 528 U.S. at 456.

131. *Weisgram*, 169 F.3d at 517 n. 2.

132. See e.g. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000); *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 306 (5th Cir. 2000); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000).

legal questions the resolution of which makes it clear that no new trial is warranted; (b) the verdict winner's grounds for a new trial presented to the district court could not be sustained as an exercise of discretion; and (c) the verdict winner presents no grounds for a new trial and no reason why he should be permitted to present such grounds to the district court in the first instance. Conversely, a federal appellate court holding that a district court erroneously denied a verdict loser's motion for judgment as a matter of law should allow the district to resolve any new trial motion by the verdict winner where: (a) it is unfair to require the verdict winner to present his new trial grounds to the court of appeals; (b) the new trial grounds involve an exercise of the district court's discretion that would be entitled to respect on appeal; and (c) the district court is in a superior position to determine whether a new trial should be granted. On the facts of *Weisgram* itself, it appears that the verdict winner should have received the opportunity to present any new trial grounds to the district court.

A return to *Neely's* healthy respect for the many circumstances in which a verdict winner's new trial motion is best decided by the district court would be welcome. Otherwise, the *Neely/Weisgram* rule that federal appellate courts have the power to direct entry of judgment as a matter of law may well have more costs than benefits.

